

v. 3019

No. 15343

United States
Court of Appeals
for the Ninth Circuit

MIKE H. KOSTELAC and MARYLAND CASU-
ALTY COMPANY, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

MIKE H. KOSTELAC and MARYLAND CASU-
ALTY COMPANY, a Corporation,

Appellees.

Transcript of Record

Appeals from the United States District Court for the
Western District of Washington.
Southern Division.

FILE

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Western District
of Washington, Southern Division

No. 1581

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIKE H. KOSTELAC and MARYLAND CASU-
ALTY COMPANY, a Corporation.

Defendants.

COMPLAINT

The United States of America, plaintiff, by J. Charles Dennis, United States Attorney for the Western District of Washington, acting under the direction and authority of the Attorney General of the United States and for cause of action against the above-named defendants, alleges:

I.

That the plaintiff is a corporation sovereign, and jurisdiction exists by reason of Title 28, U. S. Code, Section 1345.

II.

That the defendant, Mike H. Kostelac, is not presently within this district, but plaintiff is advised and therefore alleges, that said defendant has filed with local counsel a written consent authorizing said counsel to accept service on said defendant's behalf and submit to the jurisdiction of this court.

III.

That at all of the times herein mentioned, the defendant Maryland Casualty Company, has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of Maryland, having a place of business in Tacoma, Washington, and authorized to do business in the State of Washington; and has designated a person residing and who now resides in Seattle, Washington, in said Western District of Washington, upon whom process in civil actions against said corporation may be served as the representative of said corporation.

IV.

That on or about June 29, 1946, the defendant, Mike H. Kostelac, entered into a contract in writing with the United States of America, plaintiff herein, said contract being designated, "Contract No. W-45-016 (S. C.-IX) S-497," and consisting of said defendant's bid dated June 26, 1946, and the plaintiff's acceptance as to item No. 2 thereof, dated June 29, 1946, under the terms of which contract the said defendant, Mike H. Kostelac, agreed to collect and remove daily for a five-year period commencing July 1, 1946, unless sooner terminated at the convenience of the Government upon thirty days' notice in writing, all garbage suitable for animal consumption, excluding grease, bones and raw meat trimmings, accumulating at all messes at Fort Lewis South, Fort Lewis North, Fort Lewis Northeast, Section 5 Hospital, and Mount Rainier Ordnance Depot, averaging 40,000 men, estimated at .04 pounds per man per day, and to pay therefor on a

per man per month basis, at the sliding scale of prices provided in the contract, in the total estimated amount of \$200,000, payment to be made on or before the 10th day of each month for the garbage removed during the preceding month.

V.

That pursuant to provision No. 1 of the General Conditions of said contract, the said defendant, Mike H. Kostelac, executed and furnished the United States of America a bid bond dated June 26, 1946, in the penal sum of \$40,000, conditioned that the said defendant enter into a written contract with the Government, in accordance with the bid as accepted, and give bond with good and sufficient surety for the faithful performance and proper fulfillment of such contract: that the defendant, Maryland Casualty Company, a corporation, was the surety upon said bond. That said surety bond was further conditioned for the payment to the Government of the difference between the amount specified in defendant's bid and the amount for which the Government might procure the required work and/or supplies in case the said defendant, Mike H. Kostelac, failed to enter into such contract and give such bond within the time specified.

VI.

That said defendant, Mike H. Kostelac, collected and removed kitchen waste for the months from July 1, 1946, through to December 15, 1946, and there became due and owing on account thereof

under said contract to the plaintiff for such period the sum of \$24,261.16; that said defendant failed to make payment for any garbage collected under said contract, and by reason thereof was declared in default and notified by letter dated November 27, 1946, that he would be given the opportunity of remedying his default at any time prior to December 13, 1946, and that upon failure so to do, the said kitchen waste would be sold to the highest bidder and the Government would proceed to collect the money due and damages that might accrue on sale from a return less than specified in defendant's contract.

VII.

That by reason of the failure and refusal of defendant, Mike H. Kostelac, to perform his said contract to collect and remove kitchen waste, as aforesaid, the plaintiff was obliged to, and did enter into contract No. W 45-016 (A.A.-VI) S-261, dated December 13, 1946, with John DeBoer, Route 2, Box 370, Olympia, Washington, the highest bidder under readvertisement, for the services required by said defendant's contract, to be performed under the same conditions, during the period beginning December 16, 1946, and ending June 30, 1951, with payment on the same basis, at the sliding rate provided for therein.

VIII.

That the Comptroller General of the United States of America has audited the accounts between the plaintiff and defendants and has certified that there

is now due and owing to the United States of America, due to said defendant's default under his contract, the aforesaid sum of \$24,261.16 for garbage collected by said defendant during the period July 1, 1946, through December 15, 1946, and \$80,102.24, representing the difference in revenue obtained by the Government on resale of the garbage to the said replacing contractor, John DeBoer, during the period December 16, 1946, to June 30, 1951, making a total sum of \$104,363.40 now due and owing to plaintiff since July 1, 1951.

IX.

That the aforesaid contract, replacing contract and bid bond are of public record on file with the General Accounting Office of the United States, and are known and designated by their respective numbers hereinbefore set forth.

X.

That no part of such total amount owed has been paid by said defendant, Mike H. Kostelac, or defendant, Maryland Casualty Company, and there is still due and owing to plaintiff on said contract the sum of \$104,363.40, which amount has been due and owing to plaintiff since July 1, 1951.

That written notice of the amount thus owing the plaintiff by defendant, Mike H. Kostelac, and the nature of the claim was given to said defendant, Mike H. Kostelac and defendant, Maryland Casualty Company, on or about January 16, 1952; that not-

withstanding repeated demands made upon the defendants, they have wholly failed, refused and neglected to pay said sum or any part thereof, and the said defendant, Mike H. Kostelac, is now indebted to the plaintiff in the full sum of \$104,363.40, and interest thereon at the legal rate from July 1, 1951, and the defendant Maryland Casualty Company is now indebted to the plaintiff in the full sum of \$40,000, the amount of its liability herein, with interest thereon at the legal rate from July 1, 1951.

Wherefore, plaintiff prays:

1. That it have and recover judgment against the defendant, Mike H. Kostelac, in the full sum of \$104,363.40, together with interest thereon at the legal rate from July 1, 1951.

2. That it have and recover judgment against the defendant, Maryland Casualty Company in the sum of \$40,000, together with interest thereon at the legal rate from July 1, 1951.

3. That it have and recover its costs herein to be taxed.

4. That plaintiff have such other and further relief as to the Court may seem just.

/s/ J. CHARLES DENNIS.

United States Attorney;

/s/ GUY A. B. DOVELL.

Assistant U. S. Attorney.

[Endorsed]: Filed May 22, 1952.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS AND COUNTER-
CLAIM FOR RESCISSION

Come now the defendants herein, and for answer to the complaint of the plaintiff herein, state and allege as follows:

1. Defendants admit the facts alleged in paragraph I of said complaint.

2. With respect to the averments in paragraph II, defendants state that defendant Kostelac has entered his appearance herein.

3. Defendants admit the averments of paragraph III, and state that defendant Maryland Casualty Company has entered its appearance herein.

4. Defendants admit the execution of Contract No. W-45-016 (S.C.-IX) S-497, referred to in Paragraph IV of the complaint herein, and defendants do hereby incorporate by reference in this pleading all the provisions of said contract, a copy of which is attached to this Answer, marked Exhibit "A," said Exhibit consisting of seven pages including the reverse sides of two pages thereof.

5. Defendants admit the execution by defendant Kostelac and defendant Maryland Casualty Company of a Bid Bond, as alleged in Paragraph V of the complaint herein, and defendants do hereby incorporate by reference all of the terms and provisions of said Bid Bond, attached hereto marked

Exhibit "B," as fully as if said Bid Bond were set out at length herein. Defendants state that plaintiff has set forth in Paragraph V of its complaint the relevant provisions of said Bond, except the following: "if the latter amount be in excess of the former," which words appear in the last four lines of the last paragraph of the body of said Bid Bond; and defendants state that the "latter amount" (being the amount of the DeBoer Contract, as alleged in Paragraph VII, et seq., of the Complaint) was not in excess of the "former" (the amount of the Kostelac contract) which said facts are admitted by plaintiff in Paragraph VIII hereof; and that by reason thereof, there is no obligation on the part of defendant Kostelac or defendant Maryland Casualty Company under said Bond.

6. With respect to the averments in Paragraph VI of the complaint, defendants admit that defendant Kostelac removed kitchen waste from July 1, 1946, to December 15, 1946; and that said defendant refused to pay the price set forth in the aforesaid contract, Exhibit "A," by reason of the mistake in the price therein, as set out hereinafter, but defendants state that said defendant Kostelac offered at all times to pay the reasonable value thereof, but plaintiff refused such offer; and defendants deny that plaintiff is entitled to the payment of \$24,261.16 therefor; that any claim therefor is further barred by the Statute of Limitation; and defendants state that defendant Kostelac at all times was ready, willing and able to collect all of said garbage and

kitchen waste, and did collect such garbage and waste until he was prevented therefrom by the plaintiff on or about December 15, 1946; and defendants require strict proof of all other allegations in said Paragraph VI of plaintiff's complaint.

7. In regard to Paragraph VII of the Complaint, defendants admit that plaintiff received payments from one DeBoer for the said garbage, but defendants do not have direct knowledge as to the details thereof, as alleged in said Paragraph VII, and require strict proof thereof by plaintiff.

8. In respect to Paragraph VIII of said Complaint, defendants admit that the Comptroller General of the United States issued to defendant Kostelac a purported statement totalling \$104,363.40, but defendants have no knowledge as to the allegation that said Comptroller General has audited said account, and deny that any such audit would be binding upon these defendants; and defendants deny that defendants are liable for any of said amount, and deny that the difference in revenue to the Government on resale of the garbage is a measure of or basis for alleged damages herein.

9. The facts in Paragraph IX do not require an answer by defendants.

10. For their answer to Paragraph X of the complaint, defendants admit that demands have been made upon them by the Government, and admit that no part of the sum of \$104,363.40 has been paid to the plaintiff, but defendants deny that any of said

sum is due plaintiff, or any interest thereon; and defendant Maryland Casualty Company denies that plaintiff is entitled to the sum of \$40,000.00 plus interest, or any portion thereof.

11. Further answering, defendants state that the aforesaid contract, Exhibit "A," was entered into by mutual mistake of the parties, and that there was no meeting of the minds because both the plaintiff and defendant Kostelac were of the belief, and under the impression that the amount of garbage examined by defendant Kostelac at plaintiff's request at Ft. Lewis in making his estimate and his bid for contract No. W-45-016 (S.C.-IX) S-497 was a one-day accumulation of garbage, whereas in fact it was an accumulation of more than one day, and therefore the average actual accumulation of garbage at Ft. Lewis was less than the parties had contemplated; that the amount of such accumulation was the basis for the price in such contract, and such price was therefore erroneous by mutual mistake of the parties; and that said contract is therefore of no legal effect.

12. Further answering, defendant state that said contract, Exhibit "A," is unenforceable by plaintiff against defendants for the further reason that the prices set out therein to be paid by defendant Kostelac for garbage on Continuation Sheet (2) were specifically based upon prices (paragraph a) to be "published * * * at the Seattle Stock Yard Market located at Seattle, Washington," whereas in fact there was not at the time said contract was

entered into, and never has been since said time, any publication at said alleged market, nor has there been any individual Seattle Stock Yard Market located at Seattle, Washington.

13. Defendants state that plaintiff is not entitled to recover herein for the further reason that plaintiff, after the execution of the aforesaid contract, Exhibit "A," disenabled itself from performing said contract; that Continuation Sheet (1) of Exhibit "A" sets forth the approximate average number of men at Ft. Lewis, Washington, upon which the bid was based, as 40,000; that the actual number of men at Ft. Lewis never at any time during said contract period approximated such figure of 40,000 men; that, on the contrary, the number of men at Ft. Lewis over said period, as shown in the official statement of the Comptroller General relied upon in Paragraph VIII of the Complaint by plaintiff, is in the amount set forth in Exhibit "C" attached hereto; that the number of men at said Ft. Lewis at times was only slightly in excess of 5,000 men, and that for one of the yearly periods under the contract the average was approximately 7,000 or 8,000 men; that defendant Kostelac relied upon the amount of garbage that would be obtained from approximately 40,000 men, in entering into said contract, and that said failure and inability of plaintiff was highly detrimental to defendant Kostelac, and invalidated said contract.

14. Defendants deny that defendant Kostelac refused at any time to pick up the garbage and trash,

in accordance with the provisions of said contract, Exhibit "A," and deny that plaintiff had the right to attempt to terminate said contract; and defendants state that the purported termination of said contract by plaintiff cannot be the basis for this action against defendants.

15. Defendants further state that the aforesaid Contract No. W-45-016 (S.C.-IX) S-497 is unenforceable by plaintiff for the further reason that said contract is vague and indefinite; that it lacks mutuality, and may be terminated at the whim of plaintiff.

16. Defendants further state that said contract constituted a rebid of previous negotiations; that neither party to said contract intended it to become operative unless one DeBoer bid thereon; that said DeBoer did not rebid, and such contract is therefore of no effect.

Counterclaim by Defendants for Rescission of Contract

Defendants, for their counterclaim for rescission of said contract, allege and state as follows:

1. That defendant Kostelac, prior to making his bid, forming a part of the contract set out in Exhibit "A," upon the written request of plaintiff as set out in General Provision No. 5, as affirmed in Paragraph 3 of the Invitation to Bid in said Exhibit "A," setting June 21, to June 26, 1946, between eight o'clock a.m. and 4:30 p.m. daily for

inspection, and also upon the verbal request of plaintiff's agents, went upon the premises of Ft. Lewis personally, on more than one occasion, and inspected large numbers of actual garbage containers at the Messhalls, prior to said containers being emptied by the person then under contract with plaintiff to remove such garbage; that defendant believed, and actually assumed, from verbal statements by plaintiff's officers, and by reason of the terms of the garbage-removal contract then in effect of which said defendant had knowledge, and which required daily pickup, that any garbage in such containers represented only one day's accumulation of garbage; that upon the basis of said thorough inspections personally made by said defendant and the facts actually observed on said inspections, said defendant assumed and determined that the average accumulation of garbage at said time and place equalled one pound of garbage per man per day; that defendant Kostelac was specifically directed by the Contracting Officer to disregard, and did therefore disregard, the reference in the bid to .04 lbs. waste per man per day; that by reason of the fact that the conditions then existing appeared to be, and were in fact, representative of the conditions to be encountered over the period of said contract, defendant Kostelac reasonably relied upon his said findings in determining the price he would and did in fact bid under said contract, Exhibit "A"; that such inspection was made by said defendant by reason of the fact that any variation in average quantities of accumulated garbage would affect the

price to be paid by said defendant, since the proposed bid was not based upon the amount of garbage to be removed, but in accordance with the number of men at Ft. Lewis; that, contrary to the belief and understanding of defendant Kostelac, and contrary to the belief and understanding of the officers in charge of said contract as expressed to defendant Kostelac, the actual containers examined on said occasions by defendant Kostelac did not in fact contain only a one-day accumulation of garbage, but in fact contained a two-day accumulation of garbage; that by reason of such error and mistake, defendant Kostelac prepared his bid, attached hereto as a portion of Exhibit "A," in an amount averaging approximately twice the amount that said defendant would have bid if such mistake had not been made in said quantity of garbage; that defendant Kostelac did not learn of said error until the third day of his operation under said contract attached hereto as Exhibit "A," at which time the daily accumulations of garbage were found by him to be approximately one-half the amount estimated by defendant Kostelac; that immediately upon learning of such mistake, defendant Kostelac notified plaintiff's Contracting Officer, Major P. P. Maiorano, and in addition, a few days thereafter, through his attorney, gave written notice to said Contracting Officer of the mistake; and said defendant continued to give notice thereafter not only to said Contracting Officer, but to other Government personnel in a supervisory capacity at the Service Command, at Army Headquarters for said Pacific area, and in

Washington, D. C., including numerous long trips made by defendant; that defendant Kostelac at all times and repeatedly offered to pay to the Government the reasonable value of the garbage being picked up under said contract, and to pay the price that would have been bid by said defendant in the absence of said mistake; and that said defendant constantly and continually requested to be relieved by plaintiff from said mistake, and from the consequences thereof; but that plaintiff, through its officers and agents, delayed, procrastinated and failed, refused and neglected to take action to relieve defendant of said consequences, and delayed giving any final decision to defendant; that during said period said defendant Kostelac continued to carry away the said garbage from Ft. Lewis, in order to avoid unsanitary conditions, even though said defendant was required to dispose of most of said garbage at a complete loss to said defendant; that plaintiff's refusal to release said defendant from the consequences of said mistake was placed by plaintiff on the ground that defendant was bound to plaintiff on a legal technicality

2. Defendants state that said mistake referred to above, by reason of the facts set out above, constituted a mutual mistake of the parties and that defendants are entitled to have said contract, attached hereto as Exhibit "A," rescinded, cancelled and held for naught by this Court.

3. Defendants state that in the event said mistake was not a mutual mistake of the parties, but

was a mistake of defendant Kostelac alone, then defendants are nevertheless entitled to a rescission of said contract, attached hereto as Exhibit "A," in that said mistake was made by said defendant in good faith, without negligence, and said mistake was caused, at least in part, by the actions of the officers of plaintiff in causing or contributing to defendant's being misled as to the amount of said garbage; that plaintiff will suffer no loss of said contract is rescinded, except that plaintiff will be prevented from exacting an unfair, unintended and unconscionable price from defendants, such price being approximately twice the value of such garbage.

Wherefore, defendants pray that this Court enter an order that the aforesaid contract, attached hereto as Exhibit "A," be cancelled, rescinded, and held for naught, and that no liability has accrued against defendants by reason of said contract; and that this Court grant to defendants any other or further relief as to this Court may seem meet and proper in the premises.

TENNEY & DAHMAN,

By /s/ E. H. TENNEY, JR.:

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN,

By /s/ CHAS. D. HUNTER, JR.,

Attorneys for Defendants.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 16, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Come now the defendants herein and move this Court for a Summary Judgment in favor of said defendants, and for a Finding by this Court that said defendants are not liable to plaintiff herein; and as their basis for such Motion, defendants state that the following facts are not the subject of a dispute herein, and there is no genuine issue as to the following material facts, and that defendants should be granted Summary Judgment herein on the basis of any one of such undisputed facts:

1. The contract in issue was entered into under mutual mistake of the parties as to a material fact.

Defendants state that the lack of any genuine issue of fact as to the above is shown in the verified Answer and Counterclaim of defendants herein and in the Affidavit for Summary Judgment attached hereto; and defendants state that the Contracting Officer, Major P. P. Maiorano, the sole representative of the plaintiff on said contract was acting under a mistaken view in that he had no knowledge that the garbage accumulated at Ft. Lewis at the time in question was of more than one day's duration, and said Contracting Officer has admitted such fact; that said Contracting Officer has further admitted that he had determined, after execution of said contract, that pick-ups of garbage at said time and place were not always on a daily basis, and has

admitted that such pick-ups at the time in question were probably on a two-day basis; and defendants state that they are informed that the said Contracting Officer has not at any time, in his reports or otherwise, and does not now dispute the fact that defendant Kostelac was misled by the amount of garbage in the containers examined by him as set out herein.

2. (In the alternative.) The contract was entered into by reason of a unilateral mistake by defendant Kostelac which under the law is a basis for rescission of said contract.

Defendants state that even if the facts relating to a mutual mistake of the parties should be in dispute (which is denied), it is shown by the verified Counterclaim and the Affidavit for Summary Judgment herein that there is no genuine issue of fact as to the existence of an excusable unilateral mistake made by defendant Kostelac; that in addition to the Contracting Officer's concession that defendant Kostelac made a mistake, there is no dispute that plaintiff's own Paragraph 3 of its Invitation to Bid (and General Provision 5 thereof) was the cause of this mistake by defendant Kostelac, and that such provisions invited the error; that there is no dispute that plaintiff had notice that defendant Kostelac bid twice too high, inasmuch as plaintiff has sued herein for an amount equal to approximately one-half of the contract price; that the ground for plaintiff's claim, as made by its Comptroller Gen-

eral, is the alleged view that unilateral mistakes cannot be corrected in contracts; and that there is no dispute that such error was unintentional by defendant Kostelac; that notice of the mistake was immediately given to plaintiff by defendant Kostelac; that an opportunity to remedy such mistake was afforded by defendant Kostelac immediately, without any delay; that plaintiff would suffer no loss as the result of rescission of this contract, except that it would not receive an unconscionable gain; and that the only dispute concerns the legal principles applicable to such facts.

3. Regardless of mistake, said contract is unenforceable for the further reason that the price is based upon market publications not in existence.

Defendants state that it appears from the pleading in Paragraph 12 of the Answer herein, together with Paragraph 4 of Affidavit of defendant Kostelac, that there is no dispute as to the fact that there was no market publication at Seattle, Washington, Stock Yard during the period of this contract; that this fact is admitted by plaintiff's own Department of Agriculture; and defendants state that by reason thereof, said contract is vague, uncertain and unenforceable and the price therein is based upon certain quotations not in existence.

4. Plaintiff has disenabled itself from performing this contract after the alleged breach by defendant Kostelac, in that the number of

men at Ft. Lewis fell far below the contract estimate on which the price was based.

Defendants state that it is shown from Exhibit "C," attached to the Answer of Defendants herein, verified by the Affidavit of defendant Kostelac that the plaintiff's performance failed after the alleged breach by defendant Kostelac, that plaintiff failed to furnish at Ft. Lewis even an approximation of the number of men originally contemplated, and failed to furnish more than a small fraction of the 40,000 rations estimated; and that by reason of such default, plaintiff is not entitled to recover herein.

5. Plaintiff has alleged no facts in Paragraph VI of the Complaint to justify its "Declaring said contract in Default" and suing for its breach.

Defendants state that the attached affidavit of defendant Kostelac and the verified Counterclaim of defendants herein, show that there is no failure by said defendant to perform, and therefore no ground for suit by plaintiff for breach of contract.

6. There is no liability under the Bid Bond because the amount of the DeBoer Contract is not in excess of the Kostelac Contract, as required by the specific wording of said bond.

Defendants state that they believe there is no dispute as to the wording of the Bid Bond attached to the Answer as Exhibit "C"; that as alleged in Paragraph 5 of defendants' Answer, plaintiffs have sued upon a penalty instrument and have failed to allege or prove the principal term and condition of said

bond; that on the contrary plaintiffs have specifically alleged facts in Paragraphs VII and VIII of the Complaint showing that the DeBoer relet contract was for a smaller amount than the Kostelac contract, and that the condition of said bond was not fulfilled.

7. There is no liability for damages under the other provisions of the contract.

Defendants state that the measure of damages for failure to perform by defendant Kostelac is set out in Paragraph 7 of the General Provisions of said contract attached to the Answer as Exhibit "A"; that there is no issue of fact as to the requirement of said General Provision No. 7; and that from the facts alleged by plaintiff in its petition, plaintiff has not incurred loss by defendant Kostelac's failure to remove said property under said General Provision 7, but that in fact plaintiff, under its allegation in Paragraph VIII of the Complaint, has received pay from one DeBoer under a relet contract with said DeBoer.

Wherefore, defendants pray for summary judgment herein dismissing plaintiff's complaint at the cost of plaintiff.

TENNEY & DAHMAN,

By /s/ E. H. TENNEY, JR.;

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN,

By /s/ CHAS. D. HUNTER, JR.,

Attorneys for Defendants.

[Title of District Court and Cause.]

AFFIDAVIT OF MIKE H. KOSTELAC

State of Missouri,
City of St. Louis—ss.

Mike H. Kostelac, being duly sworn upon his oath, states that he is a defendant in this cause, and that he makes this Affidavit as a part of the Motion of Defendants for Summary Judgment herein; that the following facts are true according to the personal knowledge of defendant, unless otherwise indicated herein:

1. Affiant adopts, affirms and incorporates herein his verified Counterclaim for Rescission herein, as fully as if said counterclaim and verification thereof were set out herein; and affiant further states that on the first occasion that he examined the garbage containers, as stated in said Counterclaim, he personally examined at least 40 garbage containers; and that he later examined numerous other containers; that he was told by the Contracting Officer to disregard, and he did disregard the statement in the contract as to the alleged .04 lbs. of waste per man, since it was not in fact correct, and was admitted by said Contracting Officer to be incorrect.

2. Affiant further states that Exhibit "A," attached to the Answer of Defendants, is a true and correct copy of contract No. W-45-016 (S.C.-IX) S-497, executed between the parties hereto; that affiant does not have the original of Exhibit "B."

the Bid Bond herein, but that affiant's copy (Exhibit "B") is believed to be a true and correct copy of the original; that Exhibit "C" is a true excerpt from the account of the Comptroller General of the plaintiff, sent to defendant as a part of the demand of plaintiff for the payment of the sum of \$104,363.40.

3. Affiant states that Major P. P. Maiorano, Contracting Officer and representative of the Government in connection with the aforesaid contract, never at any time to the knowledge of affiant questioned the fact that the mistake referred to herein, in connection with the bidding on said contract, was in fact made; that said representative of the Government, Major Maiorano, claimed that garbage pickup trucks were on the premises of Ft. Lewis each day, but did not contend that said trucks picked up garbage at all messhalls each day; that observations of affiant indicated that pick-ups were made from half of the messhalls one day, and the other half the next day, according to all evidence found by this affiant; that admissions were made to this affiant by agents of plaintiff after the execution of said contract, that a system of "complaints" had been in effect at Ft. Lewis for some time prior to said contract; that such "complaint" system was necessitated by the fact that garbage was not picked up at all locations every day; that the said Contracting Officer, Major Maiorano, admitted to affiant the existence of such a complaint system, caused by

reason of failure to pick up garbage at each location every day.

4. Affiant further states that he has examined letters from plaintiff's Department of Agriculture, Livestock Division, Rates & Registrations Section, admitting that there is no market news service conducted by said Department of Agriculture at Seattle, Washington, stating that the only reports published by said Department in the State of Washington are in Spokane, Washington, and admitting that such situation was true over the entire period of this contract, and at the time said contract was entered into.

5. Further affiant sayeth not.

/s/ MIKE H. KOSTELAC.

Subscribed and sworn to before me this 9th day of February, 1955.

[Seal] /s/ E. H. TENNEY, JR.,
Notary Public.

My Commission expires: September 10, 1958.

Receipt of Copy is Hereby Acknowledged this 16th Day of February, 1955.

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney.

[Endorsed]: Filed February 16, 1955.

[Title of District Court and Cause.]

INTERROGATORIES TO PLAINTIFF

Come now the defendants herein and submit the following Interrogatories to be answered by plaintiff herein, in accordance with Rule No. 33 of the Rules of Civil Procedure:

Please give the names and present addresses of all Mess Sergeants or other persons in charge who were on duty at any and all Messes at Ft. Lewis, Washington, at any time during the month of June, 1946. In case you do not have the present address of any of said parties, please give the latest address shown in your records.

TENNEY & DAHMAN,

By /s/ E. H. TENNEY, JR.;

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN,

By /s/ CHAS. D. HUNTER, JR.,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 16, 1955.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES
PROPOUNDED BY DEFENDANTS

Plaintiff, United States of America, makes answer to each and all of the several interrogatories contained in defendants' single Interrogatory propounded by defendants (served February 16, 1955) as follows:

The plaintiff has no information or knowledge as to the names or addresses of Mess Sergeants or other persons in charge who were on duty at any messes at Fort Lewis, Washington, at any time during the month of June, 1946.

Such list of Mess Sergeants would be designated "temporary and unofficial," and belonged at said time in 1946 to the Second Division, then occupying Fort Lewis, and was not taken to Korea by said Division.

In the absence of a permanent record or any existing record of such names and addresses, plaintiff is unable to supply defendants with any of the information requested in their interrogatories herein propounded.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 28, 1955.

[Title of District Court and Cause.]

MOTION TO COMPEL ANSWER
TO INTERROGATORIES

Come now the defendants herein and state to the Court that heretofore, on February 16, 1955, defendants propounded to plaintiff certain interrogatories under Rule No. 33 of the Rules of Civil Procedure, which said Interrogatories requested the names and addresses of Mess Sergeants or other persons in charge of messes at Ft. Lewis, Washington, during the month of June, 1946; that thereafter on or about February 28, 1955, counsel for plaintiff filed plaintiff's Answers to Interrogatories, in which plaintiff denied having any knowledge or information as to such names or addresses of such Mess Sergeants or other persons in charge of messes at Ft. Lewis at said time, and alleging that any list of Mess Sergeants would be designated "temporary and unofficial" and not taken by the Second Division of the United States Army when it left Ft. Lewis.

Defendants state that although there may not be in existence any single and separate complete list of Mess Sergeants or other persons on duty at said time and place, such information is, to the best knowledge of defendants, in the possession of plaintiff, the United States Government, through its various instrumentalities and departments; that records are kept at the United States Army Records Center in the City of St. Louis, Missouri, relating to each company of each army regiment, wherever said company was on duty at the time in question;

that defendants, through their counsel, have contacted said agency of the United States Government at St. Louis, Missouri, and defendants state upon information and belief that complete records may be obtained by counsel for plaintiff through said department, if not through other departments, and that counsel may obtain from the records of the United States Government, plaintiff herein, the names and addresses requested in the Interrogatories heretofore submitted by these defendants.

Wherefore, defendants pray that this Court order and direct plaintiff to answer the aforesaid Interrogatories, heretofore propounded to plaintiff by these defendants.

TENNEY & DAHMAN,

By /s/ E. H. TENNEY, JR.:

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN,

By /s/ CHAS. D. HUNTER, JR.,
Attorneys for Defendants.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 30, 1955.

[Title of District Court and Cause.]

AMENDED ANSWERS TO INTERROGATORIES
PROPOUNDED BY DEFENDANTS

Plaintiff, United States of America, makes this its Amended Answers to Interrogatories propounded by defendants (served February 16, 1955, and Motion served March 30, 1955), as follows:

That the interrogatories propounded by defendants request the names and current addresses of mess sergeants or other persons in charge of messes at Fort Lewis, Washington, during the month of June, 1946, and the Motion to compel answer thereto avers that although there may not be in existence a separate and complete list of such personnel, a list thereof can be compiled from the records in the possession of the United States Government, which are maintained at the Military Personnel Records Center, TAGO, St. Louis 20, Missouri.

That the monthly personnel rosters of Army units stationed at Fort Lewis, Washington, during June, 1946, together with other unit-type personnel records of such organizations, are on file in the Military Personnel Records Center; however, the military specialties and/or duty assignments of the personnel who were members of the units concerned are not recorded therein. In this connection, the regulations governing preparation of unit rosters and morning reports in effect during June, 1946, did not require the entry thereon of the military occupational specialties or duty assignments of personnel.

That from an examination of the retained administrative files of Fort Lewis, the names of six persons who held duty assignments relating to food supervision during the month of June, 1946, have been ascertained. That the names and last known addresses of these persons are, as follows.

1. Lt. Col. Robert Ryer, III, O 474 134, Det. 1, 9111th Technical Service Unit, Food and Container Institute School, Chicago, Illinois.

2. Major Robert P. Firman, U. S. A. Ret., 4130 North 30th Street, Tacoma, Washington.

3. Major Norman F. Gore, U. S. A. R., 1478 Coventry Road, Concord, California.

4. Major George A. Inglis, U. S. A. R., 2214 Elliott Street, Muskogee, Oklahoma.

5. James A. Foster, Route 1, Box 268, Olympia, Washington.

6. Carl R. Stewart, 1607 Thompson Boulevard, Ventura, California.

Dated this 15th day of June, 1955.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 15, 1955.

United States District Court, Western District
of Washington, Southern Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIKE H. KOSTELAC and MARYLAND CASU-
ALTY COMPANY, a Corporation,

Defendants.

REPLY TO COUNTERCLAIM

Comes now the plaintiff, United States of America, and for its reply to the counterclaim of defendants filed with their answer, alleges as follows:

First Defense

I.

Answering paragraph numbered 1 of said counterclaim, plaintiff admits that defendant Kostelac, prior to submitting his bid herein, made personal inspections of garbage containers at Fort Lewis, but denies that the Contracting Officer or any legal representative of the plaintiff was aware of the failure of Kostelac's predecessor to collect garbage each day as provided in the contract then in force, and in said connection plaintiff states that, on the other hand, the contracting officer warned defendant Kostelac that his estimates of the amount of garbage

that would be available under his prospective agreement were too optimistic.

II.

Answering paragraphs 2 and 3 of defendants' counterclaim, this plaintiff alleges that if a mistake, as therein alleged, was made, it was defendant Kostelac's sole responsibility, and after the aforesaid warning, and was neither induced by nor contributed to by any representative of the Government, the plaintiff herein.

III.

Plaintiff denies each and every allegation contained in the counterclaim except those hereinabove admitted.

Second Defense

Further answering said counterclaim of defendants, and by way of an Affirmative Defense thereto, plaintiff United States of America alleges as follows:

I.

That the method of computing the amounts to be paid by defendant Kostelac under the contract was an innovation and Kostelac's bid was the only one received pursuant to the subject invitation, and there was nothing in the situation which did or could have put the contracting officer on notice of the probability of an error in the bid thus requiring him to obtain verification before making the award, and accordingly, if a mistake was made it was due to Kostelac's own carelessness and competitive reck-

lessness in submitting such bid, and was neither induced by nor contributed to by any representative of the Government, it being a matter solely of his own choice, selection and responsibility, after his personal inspections at various times of the garbage containers at Fort Lewis prior to submitting his bid.

II.

That following his inspections, the defendant, Kostelac, signed a contract with plaintiff in which the estimated amount of kitchen waste is given as .04 pounds per man per day, approximately the amount he received and a little less than actually available.

III.

That defendant Kostelac now seeks, by his counterclaim, to retroactively condition his agreement on the amount of waste to be collected thereunder, in the face of the invitation, which became a part of such agreement, containing the following provision:

“Article I. No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, will not vary during the life of the contract; and any contract that may be awarded hereon will in no sense be conditioned on either the amount of waste to be collected, the number of kitchens or families, or the number of men subsisted, from time to time.”
(Emphasis supplied.)

Wherefore, plaintiff prays that the defendants' counterclaim be dismissed with costs.

/s/ CHARLES P. MORIARTY,
United States Attorney;

GUY A. B. DOVELL,
Assistant U. S. Attorney.

Receipt of copy is herewith acknowledged.

[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, United States of America, by and through its attorneys of record, the undersigned, and moves this Court that it dismiss the motion of the defendants for summary judgment for the reasons:

1. Rule 56(e) of the Federal Rules of Civil Procedure provides that affidavits shall be made on personal knowledge, shall set forth facts as will be admissible in evidence, and shall show affirmatively that the affiant is competent in the matters stated therein.

2. That the allegations as contained in the affidavit of defendant Kostelac, filed in support of defendants' Motion, are not made in compliance with said Rule 56(e).

This Motion is based upon the records and files

herein and the law and rules of court in such case made and provided.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM OPPOSING
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT

The plaintiff in opposition to defendants' Motion for Summary Judgment on the basis of the alleged facts there enumerated and numbered 1 to 7, inclusive, and set forth below, expressly refutes each and all of same and submits herewith its response to defendants' respective contentions, as follows:

I.

"1. The Contract in Issue Was Entered Into Under Mutual Mistake of the Parties as to a Material Fact."

Kostelac contends that he made a serious mistake by overestimating the amount of garbage that would be available, and accordingly he seeks judgment in favor of defendants.

Kostelac asserts in his pleadings herein that he notified the Contracting Officer later of his mistake, but there is no charge that the Contracting Officer was aware of the failure of Kostelac's predecessor to collect garbage each day as provided in the contract then in force. However, there is evidence of record that the Contracting Officer warned Kostelac that his estimates of the amount of garbage that would be available under his prospective agreement were too optimistic. But such warning was lost on Kostelac. He had made his own personal inspections and apparently could not be persuaded thereby to reconsider his estimates.

The method of computing the amounts to be paid by Kostelac under the contract was an innovation, and Kostelac's bid was the only bid received pursuant to the subject invitation. There was nothing in such situation which could have put the Contracting Officer on notice of the probability of an error in the bid, thus requiring him to obtain verification before making the award.

Aside from the foregoing, there are elements present in this case which cast some doubt on the validity of the assertion that the mistake in estimating the amount of garbage was solely responsible for Kostelac's default. These arise from the statement in the memorandum submitted by Kostelac's present attorneys to plaintiff's counsel, (page 7) and confirmed by other evidence of record that Kostelac, during part of the time he operated under his contract, picked up the garbage from

Fort Lewis and dumped it in Puget Sound, and from the fact that during this period the price of hogs was rising and thereby putting into effect the higher rates of payment provided for in the agreement. If Kostelac needed even more garbage than he was receiving, as he consistently maintained, his conduct in dumping what he obtained is inexplicable, but if the rising price of hogs required him to pay more than he had contemplated, the failure to get the estimated quantity might have been considered a plausible excuse for defaulting on an unexpectedly unprofitable agreement.

II.

“2. (In the Alternative) The Contract Was Entered Into by Reason of a Unilateral Mistake by Defendant Kostelac Which Under the Law Is a Basis for Rescission of Said Contract.”

In refutation of defendants' allegation in their motion “that there is no dispute that plaintiff had notice that defendant Kostelac bid twice too high,” plaintiff asserts that the Contracting Officer warned defendant Kostelac that his estimates of the amount of garbage that would be available under his prospective agreement were too optimistic, and denies that there was anything in the circumstances of Kostelac's bid which did or could have put the Contracting Officer on notice of the probability of an error in the bid, thus requiring him to obtain verification before making the award, and for such reason any mistake made by Kostelac was his sole responsibility and was neither induced by nor con-

tributed to by any representative of the Government.

Despite his assertion of mistake, the fact remains that after his inspection Kostelac signed a contract with plaintiff in which the estimated amount of kitchen waste is given as .04 pounds per man per day and which amount is approximately what he received, perhaps a little less than actually was available. The invitation which became a part of the agreement contains the following provision:

“Article I. No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, will not vary during the life of the contract; and any contract that may be awarded hereon will in no sense be conditioned on either the amount of waste to be collected, the number of kitchens or families, or the number of men subsisted, from time to time.” (Emphasis supplied.)

Kostelac, in this action, seeks to retroactively condition his agreement on the amount of waste to be collected thereunder.

The case would seem to fall squarely within the oft repeated rule that where a bid is accepted in good faith, a valid and binding contract is consummated. Cases exemplifying the enforcement of this rule are:

United States v. Purcell Envelope Company, 249 U.S. 313; American Smelting and Refining Company v. United States, 259 U.S. 75; Frazier-Davis

Construction Co. v. United States, 100 C.Cls. 120, 163; Ogden & Dougherty v. United States, 102 C.Cls. 249, 259; Saligman, et al., v. United States, 56 F. Supp. 505, 507.

It is equally well settled that a valid contract must be performed as written even though unforeseen difficulties are encountered which render performance more burdensome or even occasion a pecuniary loss to the party charged with such performance.

Columbus Railway, Power & Light Co. v. Columbus, 249 U.S. 399; Blauner Construction Co. v. United States, 94 C.Cls. 503; Penn Bridge Co. v. United States, 59 C.Cls. 892.

III.

“3. Regardless of Mistake, Said Contract Is Unenforceable for the Further Reason That the Price Is Based Upon Market Publications Not in Existence.”

In his affidavit dated February 9, 1955, offered in support of his Motion for Summary Judgment, Kostelac produces the following extraneous information:

“4. Affiant further states that he has examined letters from plaintiff's Department of Agriculture Livestock Division, Rates & Registration Section, admitting that there is no market news service conducted by said Department of Agriculture at Seattle, Washington, stating that the only reports published by said Department in the State of Washington are in Spokane, Washington, and admitting

that such situation was true over the entire period of this contract, and at the time said contract was entered into." (Emphasis supplied.)

While Kostelac has verified his counterclaim, he did not verify Paragraph 12 of the Answer, which states:

"12. Further answering, defendants state that said contract, Exhibit "A," is unenforceable by plaintiff against defendants for the further reason that the prices set out therein to be paid by defendant Kostelac for garbage on Continuation Sheet (2) were specifically based upon prices (Paragraph A) to be "published * * * at the Seattle Stock Yard Market located at Seattle, Washington," whereas in fact there was not at the time said contract was entered into, and never has been since said time, any publication at said alleged market, nor has there been any individual Seattle Stock Yard Market located at Seattle, Washington."

Counsel for defendants apparently have preferred to have the alleged facts in support of this contention read, in the Motion, as follows:

"Defendants state that it appears from the pleading in Paragraph 12 of the Answer herein, together with Paragraph 4 of the Affidavit of defendant Kostelac, that there is no dispute as to the fact that there was no market publication at Seattle, Washington, Stock Yard during the period of this contract; that this fact is admitted by plaintiff's own Department of Agriculture; and defendants state

that by reason thereof, said contract is vague, uncertain and unenforceable and the price therein is based upon certain quotations not in existence.”

As appears from Paragraph VII of the Complaint, payment for collecting and removing garbage was on the same basis in the replacement contract, which contained the identical provision for computation as found in the contract with defendant.

In the light of the apparent facts, plaintiff disputes the factual basis upon which defendants arrive at their conclusion that the contract, in the following respect, is “vague, uncertain and unenforceable,” to wit:

“a. The selling price of hogs, good and choice, of 200 pounds weight as published on the 15th day of each month at the Seattle Stock Yard Market, located at Seattle, Washington, * * *.”

Defendant Kostelac makes no claim of having undertaken to ascertain if such prices were published at Seattle, as stated in the contract.

IV.

“4. Plaintiff Has Disabled Itself From Performing This Contract After the Alleged Breach by Defendant Kostelac, in That the Number of Men at Ft. Lewis Fell Far Below the Contract Estimate on Which the Price Was Based.”

In refutation of the above statement and the assertion thereunder that the plaintiff failed to fur-

nish 40,000 rations estimated, and for that reason plaintiff is not entitled to recover, this plaintiff refers the defendants for its answer thereto to the wording and terms of Article I, as set forth in Paragraph II of this memorandum.

V.

“5. Plaintiff Has Alleged No Facts in Paragraph VI of the Complaint to Justify Its ‘Declaring Said Contract in Default’ and Suing for the Breach.”

The contract, as exhibited with defendants’ answer filed herein, not only calls for the collection and removal of the garbage but also requires that payment be made therefor on the tenth of each month. The complaint alleges that defendant Kostelac collected and removed garbage for a 5-6 month period, and that he failed to make payment for any garbage collected under the contract. It should be clear to the defendants from that language that the contract was breached and that under Paragraph 7 of the contract the Government properly might dispose of the garbage elsewhere and recover any loss which might result therefrom.

Defendants’ contention is in the nature of the defense of “failure to state a claim upon which relief can be granted.” Rule 12 of Federal Rules of Civil Procedure, provides: “A Motion making any of these defenses shall be made before pleading if a further pleading is permitted.” In this instance,

the Motion refers to the Answer and is, therefore, subsequently made.

VI.

“6. There Is No Liability Under the Bid Bond Because the Amount of the DeBoer Contract Is Not in Excess of the Kostelac Contract, as Required by the Specific Wording of Said Bond.”

Paragraph 1 of the General Provisions of the contract provides that in case of the successful bidder the amount inclosed with the bid will be retained as guarantee for the performance of all the terms and conditions of the purchase. In view thereof, there can be no question concerning the purpose of the bond, whereas if the terms of the bond are given the effect urged by defendants, the bond will have served no useful purpose since, by the nature of the transaction, the Government could incur a loss only in the event the replacing contract were less than the defaulted contract. Accordingly, since the bond was intended to serve as a guarantee for the performance of the contract, and since the terms of the bond are ambiguous insofar as such purpose is concerned, it is submitted that in such circumstances the terms of the bond should be given the meaning which the parties intended.

VII.

“7. There Is No Liability for Damages Under the Other Provisions of the Contract.”

The defendants' above contention apparently is

made in reference to Paragraph VII of the Complaint, which states:

“That by reason of the failure and refusal of defendant Mike H. Kostelac to perform his said contract to collect and remove kitchen waste, as aforesaid, the plaintiff was obliged to, and did enter into Contract No. W45-016 (A.A. VI) S-261, dated December 13, 1946, with John DeBoer, Route 2, Box 370, Olympia, Washington, the highest bidder under readvertisement, for the services required by said defendants’ contract, to be performed under the same conditions, during the period beginning December 16, 1946, and ending June 30, 1951, with payment on the same basis, at the sliding rate provided for therein.”

Paragraph 7 of the General Provisions of the contract provides in part that

“* * * unless the purchaser pays for and removes the property as required by the provisions of this contract, the Government shall have the right to dispose of the property and hold the purchaser responsible for any loss incurred by the Government as a result of a failure to pay for or remove the property; the time of removal and such other details of removal as may not be provided for herein, shall be arranged with the Contracting Officer.”

The reference in Paragraph VII of the Complaint to the defendants’ “failure and refusal to perform his contract” correctly charges his refusal

to pay the contract price for the garbage; and while it is true that the Government has received pay for the garbage under the replacement contract with DeBoer, the amount thereof was, as indicated in Paragraph VIII of the Complaint, less than that which was payable under the Kostelac contract because of the higher sliding rates provided in the Kostelac contract, otherwise there would be no chargeable difference to Kostelac during the period of the replacement contract, as alleged therein. Such being the case, the defendants' seventh contention is also without merit.

Discussion of Cases Cited by Parties

Dean Wm. Minor Lile in his "Notes on Equity Jurisprudence" in discussing mistakes calling for rescission observes:

"In the case of mistake calling for rescission, there has never been any real contract between the parties—their minds not having met on the same thing at the same time. On the other hand, Reformation implies two things, to wit: (1) A valid contract, well understood by both parties; (2) A subsequent reduction thereof to writing and a mistake in this reducing it to writing."
(Emphasis supplied.)

Practically all the cases cited by defense counsel and discussed in their memorandum in support of their Motion for Summary Judgment consist of cases involving what might be termed "typographical errors," where the contractor omitted through inadvertence from the total of his bid some sub-

stantial item of cost he intended to include or overlooked, and save immediate notice to the other party.

These cases did not involve a past performance and a subsequent breach as in the instant case.

In *Brown v. Bradley*, 259 S.W. 676; *Chicago, St. P. M. & O. Ry. Co. v. Washburn Land Co.* 161 N.W. 358; *Smith v. Mackin*, 4 Lans. (N.Y.) 41; *Chaplin v. Korber Realty, Inc.*, 224 Pac. 396, the mistakes involved were comparable to "typographical errors" claimed in the other cases above mentioned.

The remaining cases cited by counsel are: *Hearne v. N. E. Mutual Ins. Co.* 20 Wall 488, 22 L.Ed. 395; and *Thwing v. Hall & Ducey Lumber Co.*, 41 N.W. 815, and *New York Trust Co. v. Island Oil Transport Corp.* 34 F (2d) 653.

In the *Hearne* case a bill was filed in the Circuit Court for the District of Mass. for the reformation of a contract of insurance, which was dismissed by the Circuit Court, and the Supreme Court affirmed its decision. The result in this case of deviation from the terms of Marine Insurance was annulment of the contract as to the future, forfeiture of premium to the underwriter, equity in such case following the law, but the matter of rescission was not in question.

We fail to find any analogy whatsoever between the suit to recover purchase money at a certain price in the case of *Thwing, et al., v. Hall & Ducey Lumber Co.*, 41 N.W. 815, and in the instant case.

However, in the event an analogy should be found, we request the addition of the following provision to the quotation so far appearing:

“* * *, provided the parties can be restored to or have not changed their original positions.”

The case of *New York Trust Co. v. Island Oil Transport Corp.* 34 F (2nd) 653, was concerned with a personal covenant, not assignable, and by no stretch of the imagination could it be considered a case here in point.

The law in Washington applicable to the facts in the instant case, is well expressed in *Thiel v. Miller*, 122 Wash. 52, where at page 56, the Supreme Court said:

“The principal contention here made in behalf of appellants is that there was a mutual mistake of the parties as to the conditions of the loan secured by the mortgage such as to entitle appellants to rescind the sale contract. We cannot agree with this contention. There was a want of remembrance and knowledge of the conditions of the loan secured by the mortgage, which in a sense may be said to have been mutual; but it was a conscious want of remembrance and knowledge, in face of which the contract was voluntarily entered into. Miller seemingly did have some desire to learn the exact terms of the loan, in addition to the total amount thereof, which he was to assume; but that he did not learn the terms of the loan and that he knew he was ignorant thereof, except as to its total amount and its extreme limit as to time, and that he voluntarily en-

tered into the contract of purchase in the face of his conscious ignorance of the conditions of the loan, seems well established by the evidence. This, we think, is not in law such mistake as would entitle appellants to rescission of the contract. The law applicable to such facts is admirably stated in 2 Pomeroy's Equity Jurisprudence (4th ed.), §855, as follows:

“When parties have entered into a contract or arrangement based upon uncertain or contingent events, purposely as a compromise of doubtful claims arising from them, and where parties have knowingly entered into a speculative contract or transaction—one in which they intentionally speculated as to the result—and there is in either case an absence of bad faith, violation of confidence, misrepresentation, concealment, and other inequitable conduct mentioned in a former paragraph, if the facts upon which such agreement itself, turn out very different from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to matters of fact, and not of law, is not such a mistake, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief either by way of canceling the contract and rescinding the transaction, or of defense to a suit brought for its enforcement.”

And with respect to price agreed upon in the contract, it was held in *American Smelting Co. vs. U.S.* 259 U.S. 75, in the language of headnote 4(b):

“The claimant, having completed deliveries after alleged delays in shipping orders and after the government price had been increased under the Act of August 29, 1916, supra, (39 Stat. 649), could not, in respect of such deliveries, claim freedom from the contract because of such delays and recover the difference between the new and contract prices upon the theory that the deliveries were compulsory and called for a fair compensation under the National Defense Act and the Fifth Amendment.”

In connection with the claim of hardship as set up by the defendants, the plaintiff cites the case of *U. S. v. Purcell Envelope Company*, 249 U.S. 313, where the Supreme Court allowed the contractor a profit item of \$185,331.76, for the government's failure to award bid of approximately \$2,500,000 for supply of envelopes for four years.

In *Saligman v. U.S.* 56 F. Supp. 505, the Court found “the defendant had no notice prior to its acceptance of plaintiff's bid that there was any error in the bid submitted, and stated in that connection, at page 507:

“There is no dispute as to the law applicable in this controversy. Ordinarily no relief will be granted to a party to an executory contract in the case of a unilateral mistake. In such case when a bid has been accepted the bidder who has made a mistake will be bound and must bear the consequences thereof.” (Cases cited).

See especially in this connection, the decision of the Supreme Court in *Columbus Railway, Power & Light Company v. City of Columbus*, 249 U.S. 399, where at page 410, the Court said:

“There is no showing that the contracts have become impossible of performance.”

* * *

“We are unable to find in the allegations in this bill any statements of facts which absolves the company from the continual obligation of its contracts unless the facts to which we have referred bring the case, as is contended, within the doctrine of *viz major*, justifying the company in its attempt to surrender its franchise, and be absolved from further obligation.”

Kostelac did not omit any item, as in the cases cited by him, from the total of his bid. He knew what was contained in the contract entered into by him with the government. If for some ulterior reason, he found or concluded its performance would not be as profitable as anticipated, the same would not be a basis for rescission or cancellation asked by defendants.

Respectfully submitted,

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of pretrial conferences heretofore had, whereat the plaintiff was represented by Guy A. B. Dovell, Esq., Assistant United States Attorney, of counsel for plaintiff, and the defendants were represented by George M. Hartung, Jr., Esq., of Eisenhower, Hunter, Ramsdell & Duncan, their attorneys of record, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

1. That the United States Attorney herein is acting on behalf of the plaintiff under the direction and authority of the Attorney General of the United States.
2. That jurisdiction of this Cause and this Court exist by reason of Title 28, U.S. Code, Section 1345.
3. That defendant Mike H. Kostelac has duly entered his appearance herein, and has submitted to the jurisdiction of this Court.
4. That at all times mentioned herein the defendant Maryland Casualty Company has been, and now is a corporation organized and existing under and by virtue of the laws of the State of Maryland, having a place of business in Tacoma, Washington, and authorized to do business in the State of Washington; and has designated a person residing and

who now resides in Seattle, Washington, in said Western District of Washington, upon whom process in civil actions against said corporation may be served as the representative of said corporation; and that service has been duly made upon said defendant, and said defendant has entered its appearance in this action.

5. That on or about June 29, 1946, defendant Mike H. Kostelac entered into a contract in writing with the United States of America, plaintiff herein, said contract being designated "Contract No. W-45-016 (S.C.-IX) S-497," a duly authenticated copy of which is included in the list of identified exhibits herewith presented to the court. That said contract consists of defendant Kostelac's bid dated June 26, 1946, and the plaintiff's acceptance as to Item 2 thereof, dated June 29, 1946, a duly authenticated copy of which is included in the list of identified exhibits herewith presented to the court.

6. That pursuant to Provision No. 1 of the General Provisions of said contract, defendant Mike H. Kostelac executed and furnished to the United States of America, plaintiff herein, a "Form of Bid Bond," a duly authenticated copy of which is included in the list of identified exhibits herewith presented to the court; that the defendant Maryland Casualty Company, a corporation, was the surety upon said bond, and that said bond was signed by both defendant Mike Kostelac and de-

defendant Maryland Casualty Company by its attorney in fact for said Casualty Company.

7. That defendant Mike H. Kostelac collected and removed kitchen waste or garbage (which terms are used synonymously herein) from Fort Lewis beginning on July 1, 1946, and ending on December 15, 1946; that defendant Kostelac has made no payments for any garbage collected under said contract; that under these circumstances the plaintiff sent the defendants by registered mail identical letters dated November 27, 1946, copies of which are included in the exhibits herewith presented to the court.

8. That the United States of America, plaintiff herein, thereafter entered into Contract W-45-016 (A.A.-VI) S-261, dated December 13, 1946, with John DeBoer, Route 2, Box 370, Olympia, Washington, the highest bidder under readvertisement, for the services required by the balance of defendant Kostelac's contract, to be performed under the same conditions, during the period beginning December 16, 1946, and ending June 30, 1951, with payment on the same basis, at the sliding rate provided for therein, the application of which sliding scale set up in each contract is contained in the audit of the account between the plaintiff and defendant made by the Comptroller of the United States, a duly authenticated copy of which audit is included in the list of exhibits hereinafter set forth. That the reason given by plaintiff for entering into said new contract with John DeBoer was the alleged failure

and refusal of defendant Mike H. Kostelac to pay for said kitchen waste.

9. That the Comptroller General of the United States of America, plaintiff herein, has audited the account between the plaintiff and defendants, and the audit of said Comptroller General is accepted by the defendants with respect to the market price of hogs on dates in question, the quantities of rations (number of men) unit prices and totals thereunder as well as the relet prices and totals thereof; provided, however, that such acceptance of the correctness of said audit does not admit liability on the part of the defendants, which matter is reserved in defendants' right to question the validity of the Kostelac Contract, and to question whether said contract may be rescinded, all as more particularly set forth in defendants' contentions hereinafter stated.

10. The prices set out in said exhibited Account correctly state the prices of hogs quoted in the Seattle Post Intelligencer at the times and dates in question and is accepted as being in substantial compliance with the standard set up in each of the said contracts to ascertain the price of garbage by formula based upon hog prices published at the Seattle Stock Yard Market.

11. That the price, under the aforesaid contract with Mike Kostelac, for garbage collected by said defendant Kostelac from July 1, 1946, to December 15, 1946, amounted to the sum of \$24,261.16, and the amount of money received from DeBoer under the replacing contract during the period of

DeBoer's contract was \$80,102.24 less than the amount that would have been received from defendant Kostelac under the formula and terms of Kostelac's contract, the total of which amounts is the sum of \$104,363.40, all as more particularly shown in said audit made an exhibit hereto. That no part of said total amount has been paid by defendant Mike H. Kostelac or defendant Maryland Casualty Company; that the aforesaid contract with Mike H. Kostelac, the replacing contract with DeBoer, as aforesaid, and the Bid Bond referred to above are public records, filed, known and designated in the General Accounting Office of the United States by the respective numbers heretofore set forth.

12. That written notice of the amount claimed by the plaintiff herein, in accordance with said audit by the aforesaid General Accounting Office, together with notice of the nature of said claim as shown in said audit of account included in list of identified exhibits was given to defendant Mike H. Kostelac and defendant Maryland Casualty Company on or about January 16, 1952; but that said defendants have failed, refused and neglected to pay said sum or any part thereof, despite repeated demands.

13. That plaintiff makes claim herein against defendant Mike H. Kostelac, as stated above, in the sum of One Hundred Four Thousand Three Hundred Sixty-three Dollars and Forty Cents (\$104,363.40) plus interest at the legal rate from July 1, 1951; and makes claim against defendant Maryland

Casualty Company in the sum of Forty Thousand Dollars (\$40,000.00), with interest thereon at the legal rate from July 1, 1951, together with plaintiff's costs herein; that said sum of Forty Thousand Dollars (\$40,000.00) is a part of, and not in addition to, the claimed liability of defendant Kostelac in the sum of One Hundred Four Thousand Three Hundred Sixty-three Dollars and Forty Cents (\$104,363.40).

14. That prior to entering into said contract between plaintiff and defendant Kostelac, defendant Kostelac was verbally requested by the Contracting Officer to inspect the amount of garbage that was being accumulated at messhalls at Fort Lewis; that in addition to said verbal request, the written Invitation to Bid sent to defendant Kostelac by the Government, in General Provision 5, and also in Paragraph 3 of Page 1 of the Invitation, requested such inspection, and set the days of June 21st to June 26th, 1946, between the hours of 8:00 a.m. to 4:30 p.m. daily except Saturday and Sunday as the dates for such inspection; that inspections were thereafter made by defendant Kostelac pursuant to such verbal and such written invitations.

15. That in suggesting such inspection by defendant Kostelac, the Contracting Officer had no personal knowledge that garbage and kitchen waste were not being picked up daily from the messes referred to in said contract and said Invitation to

Inspect, and he personally assumed that such garbage and kitchen waste were being picked up daily, as required in the written contract; that if defendant Kostelac was misled by the amount of kitchen waste and garbage inspected by him in said containers, it was not due to any intentionally misleading acts on the part of said Contracting Officer; that in fact said Kostelac was told by the Contracting Officer that his estimates of the amount of garbage that would be available under his prospective agreement were too optimistic; that shortly after the defendant Kostelac commenced to collect garbage he advised the Contracting Officer at Ft. Lewis that it was his opinion, based upon the amount of garbage that he was collecting, that the prior party collecting garbage had not collected it daily as required by his contract; that the Government, shortly after being notified by defendant Kostelac of the alleged mistake, caused an investigation to be made of such alleged facts, including the contacting of witnesses at or near Ft. Lewis, including Government personnel, who were considered to be in a position to know such facts, and that the Government was unable to find any witness or other evidence to refute the contention of defendant Kostelac that pickups of garbage at said time and place were not made daily; that prior to the time defendant Kostelac inspected the garbage containers as aforesaid, there had been some complaints at Fort Lewis that garbage was not picked up every day at certain messhalls, but the Government is not informed as to when these complaints were made:

that the Government admits that it may be the fact that all the garbage was not picked up every day at the time and place in question; that the Contracting Officer did not personally inspect said containers for garbage or kitchen waste, and was therefore not personally acquainted with the level of said containers at the time of inspection, and was not personally acquainted with the fact of whether said containers were filled to the level of two-days' waste or one-day's waste.

16. That the garbage collection contract which was in operation at Fort Lewis on the dates of inspection by defendant Kostelac, shortly prior to the letting of the aforesaid contract with Kostelac, required that the person picking up the garbage and kitchen waste at said time make daily pickups of all garbage; that the Contracting Officer for plaintiff relied upon such provisions of said contract, was not personally aware of any violations of said provision of said contract and accordingly stated to defendant Kostelac, prior to his bidding on the contract that the waste or garbage in said containers should represent a one-day's accumulation thereof.

17. That the inspection of said containers for garbage was considered by the Contracting Officer for plaintiff an important procedure and step prior to letting the aforesaid contract, in order to estimate the probable amount of garbage under existing conditions, practices and procedures, and defendant Kostelac was advised by the Contracting Officer of the importance of such inspection.

18. That on or about July 10, 1946, following the commencement of operations under the aforesaid contract by said defendant Kostelac, said Kostelac advised the Headquarters Sixth Army, Presidio of San Francisco, he had talked with the Contracting Officer, Fort Lewis, on the matter of his contract for the purchase of garbage, and further advised said Headquarters he had made a mistake in estimating the amount of garbage, assigning as reason for such mistake, in brief, that the garbage containers so inspected by defendant Kostelac had contained a two-day accumulation of garbage rather than a one-day accumulation.

That a few days thereafter, said defendant Kostelac, through his attorney, by letter dated July 18, 1946, gave written notice to said Contracting Officer that he considered he had made a mistake, and therewith advised of his alleged difficulty in operating his business, a hog farm, successfully and on a profit from so small an amount of garbage.

That defendant persistently pursued efforts to have the Government modify, adjust, or cancel his said contract, addressing his communications in that respect to both the military and congressional authorities, and during which time, on or about July 24, 1946, defendant Kostelac undertook renegotiation of his contract with the Contracting Officer at a reduced sliding scale submitted by him, which renegotiation was subject to its approval by the Headquarters Sixth Army; that, however, upon referral of the same to said Headquarters, on

or about August 2, 1946, it was the determination of said Headquarters that, upon acceptance by the Contracting Officer of said contract, certain rights accrued to the Government of the United States, that the War Department was without authority to release these rights, and that accordingly said contract would be enforced in accordance with the provisions thereof.

The above decision of Headquarters, Sixth Army, was confirmed on or about September 27, 1946, by the Director of Service, Supply and Procurement, Washington, D. C., and the Commanding General, Headquarters Sixth Army, Presidio of San Francisco, California, so advised.

That Kostelac continued to collect said garbage, but without paying therefor; such collection continuing until on or about December 15, 1946, when said replacing contract to DeBoer was let following notice to each of said defendants as hereinbefore stated in Paragraph 7 of this Pretrial Order.

Thereafter by settlement No. U.S. 28564, dated February 28, 1948, a Preliminary Statement of Account was furnished the defendants by the General Accounting Office.

19. That preliminary to and immediately preceding the letting of the garbage contract in 1946, there was distributed, during the latter part of May and first part of June of said year, the usual annual Invitations to Bid for garbage disposal to approximately 21 prospective bidders, including

said Kostelac, following his request for an opportunity to bid on the annual contract.

That in previous years it had been routine procedure that contracts for garbage disposal were awarded on a yearly basis due to lack of bidders available and the unwillingness of bidders to contract for more than one year. That, however, all invitations provided for alternate types of bidding, namely, (1) on a fixed price per man per month basis, (2) fixed price per ton, (3) a sliding scale per man per month based upon published market prices of hogs, and (4) a sliding scale per ton based upon published market prices of hogs.

That accordingly the above Invitation to Bid, numbered 53, for yearly contract was distributed for bid opening set for June 7, 1946, at which time two bids were received, one each from John DeBoer and Mike Kostelac, respectively.

That opening of the bids received revealed according to Army records presently available DeBoer as the highest bidder on a straight per man per month fixed price for one year's contract, and also higher than the sliding scale alternate of defendant Kostelac based upon then current market conditions, and as a consequence DeBoer's proposed contract was forwarded to Headquarters Ninth Service Command (at that time) for approval as a normal routine procedure.

That thereafter on or about June 20, 1946, instructions were received from said Command by the

Contracting Officer at Fort Lewis with respect to obtaining bids on a sliding scale basis—long term contract upon readvertising, which instructions were complied with and resulted in Invitation to Bid No. 53 being withdrawn and cancelled and new Invitation to Bid, No. 63, prepared and distributed to the two principal bidders, DeBoer and Kostelac, on June 21, 1946, the new form of bid containing only the sliding scale long term provisions, for bids on the one basis, and the date for opening bids set for June 26, 1946.

That said readvertisement resulted in the bid, herein in question, received from Kostelac, the only bid received pursuant to Invitation No. 63, and in Kostelac being awarded the contract. And that the price bid by defendant Kostelac (\$.145, maximum on scale, per man per month) was higher than any other comparable bids ever received at Fort Lewis, either before or after the date of said contract.

20. That because of the investigation carried on by the Army officials in the matter and their inability to ascertain whether or not daily pickups of garbage were actually made in accordance with the contract, the plaintiff therefore will not adduce testimony in this respect at the trial hereof.

21. It is stipulated between the parties that the number of men at Fort Lewis over the period of the aforesaid contract with defendant Kostelac is correctly set forth in the audit account of the Comptroller General of the United States, under

the heading "Rations," which audit account is included in list of exhibits to this Pretrial Order.

Plaintiff's Contentions

1. That defendant Mike H. Kostelac entered into a valid written contract with the plaintiff, under the terms of which he agreed to collect and remove daily for a five-year period, commencing July 1, 1946, all garbage or kitchen waste accumulating at all messes at Fort Lewis divisions, Section 5 Hospital, and Mount Rainier Ordnance Depot, averaging 40,000 men, estimated at .04 pounds per man per day, and to pay therefor on a per man per month basis, at the sliding scale of prices provided in the contract, in the total estimated amount of \$200,000, payment to be made on or before the 10th day of each month for the garbage removed during the preceding month.

2. That, as required by contract, defendant Mike H. Kostelac executed and furnished the plaintiff a bid bond of even date, in the penal sum of \$40,000, conditioned that the defendant enter into a written contract with the plaintiff, in accordance with the bid as accepted, and give bond with good and sufficient surety for the faithful performance and proper fulfillment of such contract, which bond was executed by Maryland Casualty Company as surety thereon.

That said surety bond was further conditioned for the payment to the plaintiff of the difference between the amount specified in defendant Koste-

lac's bid and the amount for which the plaintiff might procure the required work and/or supplies in case defendant Kostelac failed to enter into such contract and give such bond within the time specified.

3. That defendant Kostelac collected and removed kitchen waste from July 1, 1946, through December 15, 1946, pursuant to said contract, and there became due and owing from said defendant to plaintiff, for such period, the sum of \$24,261.16.

4. That defendant Kostelac failed to make payment for any garbage or kitchen waste collected under said contract, and by reason thereof was declared in default and he and his surety were notified by letter dated November 27, 1946, in the matter of said default, in words and figures as hereinabove referred to in Paragraph VII of this Pretrial Order.

5. That by reason of the failure and refusal of defendant Mike H. Kostelac to perform his said contract, the plaintiff was obliged to, and did enter into Contract No. W-45-016 (A.A.VI) S-261, dated December 13, 1946, as hereinbefore stated in Paragraph VII of this Pretrial Order.

6. That due to defendant Kostelac's default under his contract, there is now due and owing to plaintiff United States of America the aforesaid sum of \$24,261.16 for garbage collected by said defendant during the period July 1, 1946, through December 15, 1946, and \$80,102.24, representing the

difference in revenue obtained by the plaintiff on resale of the garbage to the said replacing contractor, John DeBoer, during the period December 16, 1946, to June 30, 1951, making a total sum of \$104,363.40 now due and owing to plaintiff since July 1, 1951, no part of which has been paid, and on account of which defendant Mike H. Kostelac is now indebted to plaintiff in the full sum of \$104,363.40 and interest thereon at the legal rate from July 1, 1951, and defendant Maryland Casualty Company is now indebted to the plaintiff in the sum of \$40,000.00, the amount of its liability herein, with interest thereon at the legal rate from July 1, 1951.

7. That as to defendants' defense of mistake, it is plaintiff's contention, from a factual standpoint, that if such mistake was made it was defendant Kostelac's sole responsibility and was neither induced by nor contributed to by any representative of the plaintiff.

That regardless of the sliding scale methods mentioned in the prior Invitations, the actual method of computing the amounts to be paid by Kostelac under the contract was an innovation, and, in the absence of any other bid, there was nothing in the situation which could have put the Contracting Officer on notice of the probability of any error in the bid, thus requiring him to obtain verification before making the award.

From a legal standpoint, defendant's position appears equally unsound:

(a) Despite his assertion of mistake, the fact remains that after his inspections defendant Kostelac signed a contract in which the estimated amount of kitchen waste is given as .04 pounds per man per day, and this is approximately what he received—perhaps a little less than actually was available.

(b) The invitation which became a part of the agreement contains the following provision:

“Article 1. No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, will not vary during the life of the contract; and any contract that may be awarded hereon will in no sense be conditioned on either the amount of waste to be collected, the number of kitchens or families, or the number of men subsisted from time to time.” (Emphasis supplied.)

That aside from the foregoing, the admitted dumping or non-use of garbage collected by Kostelac does not support his theory that the insufficiency of garbage prevented his full performance of the contract.

Defendants' Contentions

Defendants contend that under the agreed facts, together with evidence to be presented at the trial, defendants are entitled to rescission of the contract between plaintiff and defendant Kostelac on the ground of “mutual mistake” of the parties; or in the event that the Court finds that a mutual mis-

take did not exist, then by reason of a "unilateral mistake" by defendant Kostelac. Defendants further contend that the Government was in fact disabled from performing its contract after said contract was signed, and also after the date of the alleged breach by defendant Kostelac, in that the number of men at Fort Lewis, as shown in Exhibit "3," fell so greatly below the general estimate upon which said contract was based, as set out in said contract, that under said facts, and under the law, defendant Kostelac thereafter became fully released from any liability under said contract. Defendant Kostelac also denies that he committed any breach which justified plaintiff in purportedly cancelling his said contract as of December 15, 1946, in that at no time did he fail to collect said garbage from Fort Lewis and remove it from said premises; that his only alleged failure was to pay a price concerning which there was a dispute, and concerning which dispute the plaintiff gave defendant no final answer prior to the time said contract was purported to be cancelled by plaintiff; that there was no other price that said defendant could pay, pending such decision. Defendants also deny liability for the Twenty-four Thousand Two Hundred Sixty-one Dollars and Sixteen Cents (\$24,261.16), the alleged contract price of the garbage actually removed by defendant Kostelac, because: Such price is at least twice too high by reason of the mistake for which rescission is prayed herein, and such alleged price cannot be the basis for holding defendants, or either of them, herein. Defend-

ants further contend that there is no liability to plaintiff by either of said defendants under the Bid Bond, by reason of the express wording thereof and under the facts of the case, and that plaintiff has failed to prove an essential condition in said bond.

Issues of Law and Fact

The issues of law and fact are set forth in the respective contentions of the parties, as hereinabove stated.

Exhibits

The exhibits of all parties below listed were produced and marked, and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. Exhibits not listed will be admitted by the Court where good cause be shown for the withholding or delay in presentation thereof.

List of Exhibits

1. Copy of Government's garbage contract with Mike H. Kostelac, made June 29, 1946, consisting of Kostelac's bid, dated June 26, 1946, and Government's acceptance as to Item 2 thereof, dated June 29, 1946, and including the General Provisions, Articles and Schedules contained in said contract, designated "Contract No. W 45-016 (S.C.-IX) S-497" (6 Photostatic Sheets), and attached thereto a copy of "Standard Government Form of Bid Bond," dated June 26, 1946, made by Mike H. Kostelac, as principal, and Maryland Casualty

Company, as surety, to the United States of America in the sum of \$40,000.00 for performances therein specified (2 Photostatic Sheets), said copies being together certified at the direction of the Comptroller General of the United States to be true copies of the official documents on file in the General Accounting Office in the case designated "Mike H. Kostelac," by certificate thereof dated March 21, 1952.

2. Copy of Government's replacing garbage contract with John DeBoer, made December 13, 1946, consisting of DeBoer's bid, dated December 13, 1946, and Government's acceptance on same date, as to Item 2 thereof, and also including the General Provisions, Articles and Schedules contained in said contract, said copy containing ten photostatic sheets, and certified at the direction of the Comptroller General of the United States to be true copies of the official documents on file in the General Accounting Office in the case designated "Mike H. Kostelac," by certificate thereof dated March 21, 1952.

3. Copy of the audit of the account between the plaintiff and defendants made by the Comptroller General of the United States and certified by direction of the Comptroller to be a true transcript, in 5 numbered documents from the books and proceedings of the General Accounting Office in the case designated "Mike H. Kostelac," by certificate thereof dated March 21, 1952. Said audit of account is made an exhibit hereto for the purpose herein-

before stated in paragraph numbered 9 of this Pretrial Order and of showing the written notice, dated January 16, 1952, of amount claimed by plaintiff, in accordance with said audit, as hereinbefore referred to in paragraph numbered 12 of this Pretrial Order.

4. Photostatic copy of letter dated November 27, 1946, from contracting officer, Fort Lewis, relative to default in contract, addressed to Mike Kostelac, Star Route, Gig Harbor, Washington.

5. Photostatic copy of letter dated November 27, 1946, from contracting officer, Fort Lewis, relative to default in contract, addressed to Maryland Casualty Co., 1300 Puget Sound Bank Building, Tacoma, Washington.

Copy of letters referred to herein and next preceding paragraph are made exhibits in accordance with paragraph 7 of this Pretrial Order.

Additional Evidence

At the trial of this cause either and both parties may submit additional evidence on any of the issues of this case provided such evidence shall not contradict any facts agreed to herein. Neither party has demanded a trial by jury, and the trial herein shall be to the Court.

Action by the Court

The Court has ruled that genuine issues as to material facts may not be established by affidavit

offered in support of the defendants' Motion for Summary Judgment, the plaintiff being entitled to its day in Court.

This ruling was formally set forth in the Court's Order entered herein on December 9, 1955.

The foregoing Pretrial Order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by Order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

Dated at Tacoma, Washington, this 11th day of May, 1956.

/s/ GEO. H. BOLDT,

United States District Judge.

Form Approved:

/s/ GUY A. B. DOVELL,

Of Attorneys for Plaintiff.

/s/ GEORGE M. HARTUNG, JR.,

Of Attorneys for Defendants.

[Endorsed]: Filed May 11, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for trial on the 4th day of June, 1956, before the Court, sitting without a jury, plaintiff appearing by its attorneys, Charles P. Moriarty, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said District, and defendants appearing by their counsel, E. H. Tenney, Jr., of Tenney, Dahman & Smith of St. Louis, Missouri, and by George M. Hartung, Jr., of Eisenhower, Hunter, Ramsdell & Duncan, local counsel for defendants; and pursuant to the Pretrial Order heretofore entered the issue herein having been confined to that of defendants' liability, reserved in their right to question the validity of the contract and bond involved in this action and whether the contract may be rescinded, and the further question of whether defendant Kostelac breached his contract; evidence, both oral and documentary, having been introduced, briefs having been submitted and oral arguments having been made, and the cause submitted for decision upon the law and the evidence, and the Pretrial Order and issues presented thereby; and the Court having reviewed the testimony, examined the exhibits introduced, and read and considered the memorandums of counsel, and being fully advised in the premises and having heretofore on June 5, 1956,

announced its decision orally, does now make the following:

Findings of Fact

I.

The jurisdiction of the subject matter of this cause exists by reason of Title 28, U.S.C.A., Section 1345; and the parties defendant have submitted to the jurisdiction of this Court.

II.

On or about June 29, 1946, defendant Mike H. Kostelac entered into a contract in writing with the United States of America, which consisted of his bid, dated June 26, 1946, and the plaintiff's acceptance, dated June 29, 1946, whereby he agreed to collect and remove garbage suitable for hog feed from Fort Lewis, and to pay the price therefor stated in the contract.

III.

In accordance with the provisions of the contract upon which he submitted his bid, defendant Kostelac therewith furnished plaintiff a form of bid bond, signed by him as principal, and by defendant Maryland Casualty Company, as surety, in the penal sum of \$40,000.00.

IV.

Thereafter defendant Kostelac entered upon the performance of his garbage contract on July 1, 1946, and in a period of three or four days following commencement of his operations came to the conclusion that he was not obtaining the amount of

garbage he had estimated would be available daily from the messhalls at Fort Lewis.

V.

There is no question but that defendant Kostelac made an error or miscalculation when he prepared his bid on the contract for garbage removal from Fort Lewis, but whether the error was the result of mistake in fact in the narrow legal sense of that term is more questionable. However, it does not appear for sure that it need be decided whether such mistake was unilateral or mutual; for the reason, that if there was either, apparently it came to his attention in three or four days after his entry upon execution of the contract. Defendant himself says so.

VI.

If it is assumed that it was a mistake adverse to defendant Kostelac, he would then be entitled to demand rescission or reformation. Rescission would have been applicable if the mistake was such that there was never a meeting of minds in the contract sense. Reformation would have been applicable if the mistake was in putting down in the contract what their minds had met upon. Rescission completely sets aside the instrument on the theory there never was a contract between the parties through either mistake or some other reasons.

VII.

In this instance, defendant Kostelac did not demand either rescission or reformation. What he

sought in effect was renegotiation which was a matter for the administrative judgment and discretion of the Army authorities and not a matter for the court. It is not within the province of the court to renegotiate a contract for these parties. If defendant Kostelac, on the other hand, had taken the position promptly and within a reasonable time that there was no contract at all because of the alleged mistake, and had then demanded that the contract be declared at an end and that he be freed of its obligations, it is quite possible that such demand might have been accepted at that time, because within a few days of the letting of the contract other arrangements for the collection of the garbage could readily have been made with some of the other bidders on the same contract, who at that time, presumably, were in business set up and ready to take on the responsibilities of collecting garbage at the Fort. DeBoer, for example, had his organization, his farm and swine, his workers, his equipment, and so on, and had that rescission occurred in all likelihood a new arrangement for the collection of the garbage could have been made with little, if any, damage to anyone. Kostelac, however, did not take that position. He continued with performing under the contract, or at least performing the garbage collection responsibilities required under the contract, all the while claiming and asserting that there ought to be a different basis for compensation for the garbage; accordingly, remedies, now sought, are not available.

VIII.

Reformation was never in order. There was no putting down of figures, which should have, for example, been five instead of ten.

IX.

The foregoing observations bring attention down to the proposition that without demanding rescission or reformation which, of course, was never applicable anyway, but at most asserting renegotiation which was refused ultimately by the Army authorities, defendant Kostelac continued with the collection of the garbage until December 15, 1946, and the Court feels obliged to hold that in doing so this collection was under the contract which had not been rescinded and which Kostelac had not asked to be rescinded. Accordingly, the garbage collected during that period must be paid for according to the terms of the contract which, as appears from Exhibit No. 3, is in the amount of \$24,261.16, being for the period July 1 to December 15, 1946.

X.

It is probable that a rigid and narrow view of the matter would require that further damage be awarded, as demanded by the Government, but the Court does not feel obliged to take such a view under the peculiar circumstances of this case. It seems to the Court that Kostelac might well have secured appropriate relief by rescission had he promptly sought it, that there may well have been a substantial and important mistake as to the quan-

tity of garbage that might be expected from the Fort, so that while I find and hold that Kostelac, who, by the way, had the benefit of counsel at this time, did not proceed as required under the law of contracts, the Court is persuaded that under the circumstances no further damages should be allowed and that interest should run from the date of the Certificate of Indebtedness, namely, January 16, 1952, rather than from the earlier period.

XI.

Interest on the awarded sum of \$24,261.16 should run at the legal rate, to wit, six per cent (6%) per annum from January 16, 1952, the date of the Comptroller's Certificate of Indebtedness, rather than from the original expiration date of the contract of July 1, 1951, as asked by the plaintiff.

XII.

The Court is fully satisfied without expatiating on it, that this liability of Kostelac is within the intent and purpose of the bond when its provisions are considered and construed as a whole in the light of the circumstances under which the bond was given, and, accordingly, judgment should run against the bondsman as well as the principal, Kostelac.

XIII.

The further question of the effect upon the contract of a later reduction in military personnel does not call for consideration in the premises.

From the foregoing Findings of Fact, the Court now concludes:

Conclusions of Law

I.

The Court has jurisdiction of the subject matter of this action and of the parties hereto.

II.

The plaintiff is entitled to judgment herein against the defendants, Mike H. Kostelac and Maryland Casualty Company, jointly and severally, in the sum of \$24,261.16, together with interest thereon at the rate of six per cent (6%) per annum from January 16, 1952, to date of judgment, and for its costs herein, and judgment should be entered in accordance herewith, and bear interest at said rate.

The defendants, by counsel, have excepted to each and every adverse finding of fact and conclusion of law by the Court, hereinabove set forth, and said exceptions are hereby allowed.

Done in open Court this 22nd day of June, 1956.

/s/ GEO. H. BOLDT,

United States District Judge.

Approved as to form only, and Notice of Entry Waived, and receipt of copy hereof acknowledged this 22nd day of June, 1956.

/s/ GEORGE M. HARTUNG, JR.,

Of Attorneys for Defendants

Presented by:

/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

Lodged June 12, 1956.

[Endorsed]: Filed June 22, 1956.

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United States District Court, Western District of
Washington, Southern Division

No. 1581

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIKE H. KOSTELAC and MARYLAND CASU-
ALTY COMPANY, a Corporation,

Defendants.

JUDGMENT

This cause coming on regularly for trial on the 4th day of June, 1956, before the Court, sitting without a jury, plaintiff appearing by its attorneys, Charles P. Moriarty, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said

District, and the defendants appearing by their counsel, E. H. Tenney, Jr., of Tenney, Dahman & Smith, of St. Louis, Missouri, and by George M. Hartung, Jr., of Eisenhower, Hunter, Ramsdell & Duncan, local attorneys for the defendants; evidence, both oral and documentary, having been introduced, briefs having been submitted and oral arguments having been made, and the cause submitted for decision upon the law and the evidence, and the Pretrial Order theretofore entered and the issues presented thereby; and the Court having considered the same and being fully advised in the premises, and having heretofore on June 5, 1956, announced its decision orally, and consonant therewith having heretofore on this day made and entered its Findings of Fact and Conclusions of Law wherefrom it appears that the plaintiff is entitled to recover judgment against the defendants on its claim herein, with interest and costs; it is now, therefore,

Ordered, Adjudged and Decreed that the plaintiff, United States of America, do have and recover judgment against the defendants, Mike H. Kostelac and Maryland Casualty Company, jointly and severally, in the amount of \$24,261.16, together with interest thereon at the legal rate of 6% per annum from January 16, 1952, to date of this judgment, amounting to \$6,455.02, and making a total of \$30,716.18, principal and interest to date, and that plaintiff recover its costs herein to be taxed.

The defendants, by counsel, have excepted to each and every adverse ruling of the Court, hereinabove set forth, and said exceptions are hereby allowed.

Done in open court this 22nd day of June, 1956.

/s/ GEO. H. BOLDT,

United States District Judge.

Approved as to Form only and Notice of Entry Waived and Receipt of Copy Hereof Acknowledged this 22nd day of June, 1956.

/s/ GEORGE N. HARTUNG, JR.,

Of Attorneys for Defendants.

Presented by:

/s/ GUY A. B. DOVELL,

Assistant United States At-
torney.

Lodged June 12, 1956.

[Endorsed]: Filed and entered June 22, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE NINTH
CIRCUIT COURT OF APPEALS

Notice is hereby given that Mike H. Kostelac and Maryland Casualty Company, a corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from

the final judgment entered in this action of June 22, 1956.

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN,

By /s/ GEORGE N. HARTUNG, JR.,
TENNEY, DAHMAN & SMITH,

By /s/ E. H. TENNEY, JR.,
Attorneys for Appellants Mike H. Kostelac and
Maryland Casualty Company, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, plaintiff, above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on June 22, 1956, insofar as it does not grant the plaintiff recovery against the defendant, Mike H. Kostelac, in the full sum of \$104,363.40, with interest thereon at the legal rate from July 1, 1951, and against the defendant, Maryland Casualty Company, in the full sum of \$40,000, with interest thereon at the legal rate from July 1, 1951, as prayed for in its Complaint.

Dated this 16th day of August, 1956.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for
Appellant, United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed August 16, 1956.

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In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1581

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIKE H. KOSTELAC and MARYLAND CASU-
ALTY COMPANY, a Corporation,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings in the above-entitled
and numbered cause in the above-entitled court, be-
fore the Honorable George H. Boldt, United States
District Judge, commencing at 10:00 o'clock a.m.,
June 4, 1956, at Tacoma, Washington.

Appearances:

On Behalf of the Plaintiff:

MR. GUY A. B. DOVELL,
Assistant United States Attorney,
Federal Courthouse,
Tacoma, Washington.

On Behalf of the Defendants:

MR. GEORGE N. HARTUNG,
EISENHOWER, HUNTER, RAMS-
DELL and DUNCAN,
Puget Sound Bank Building,
Tacoma, Washington.
MR. EDWARD TENNY,
TENNY, DAHMAN and SMITH,
506 Olive Street,
St. Louis 1, Missouri.

The Court: No. 1581, United States vs. Kostelac.
Are you ready?

Mr. Hartung: Ready, your Honor.

Mr. Tenny: Ready, your Honor.

The Court: Go ahead.

Mr. Dovell: Your Honor, this case is one of long standing with the garbage contract at Fort Lewis. The pretrial order in this case has been entered on the 9th day of December, 1955, and it admits the Government's case in chief with the exception that the exhibits are lodged with the Clerk, and we offer those at this time, if there is no objection, pursuant to the pretrial order.

Mr. Tenny: We have no objection to the exhibits.

The Court: All right. The exhibits referred to in the pretrial order numbered as the Clerk will indicate——

The Clerk: Plaintiff's Exhibits 1 to 5, inclusive, your Honor.

The Court: These exhibits are admitted in evidence.

(Thereupon, Plaintiff's Exhibits Nos. 1 to 5, inclusive, for identification were admitted into evidence.)

The Court: Will you briefly tell me what each one of these is, please?

Mr. Dovell: Exhibit 1 is a copy of the Government's garbage contract with Mike Kostelac which is the bid dated [2*] June the 26th of '46 and accepted June 29th. That is contract W-45016SC-19S-497, and attached to that exhibit is a copy of the bid bond, or former bid bond, entitled "Standard Government Form Bid Bond," dated June 26, made by Mike H. Kostelac as principal and Maryland Casualty Company as surety.

Exhibit 2 is the replacing garbage contract with John DeBoer made December 13, 1946, consisting of his bid, dated December 13, and Government's acceptance in the same date.

Exhibit No. 3 is a copy of the order of the account between the plaintiff and defendant made by the Comptroller General of the United States.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Exhibit No. 4 is a photostatic copy of a letter dated December 27, 1946, from the Contracting Officer at Fort Lewis relative to the defaulting contract and addressed to Mike H. Kostelac.

Exhibit No. 5 is a photostatic copy of the same letter dated November 27 of '46 from the Contracting Officer at Fort Lewis relative to the contract, and that one is addressed to Maryland Casualty Company as surety.

They are the exhibits that I offer, your Honor, and that is the Government's case in chief.

The Court: All right. You rest then?

Mr. Dovell: Yes, your Honor.

Mr. Tenny: If the Court please, for the record I believe it is appropriate at this time for us to file a motion [3] to dismiss on certain technical grounds which I would like to discuss later, if I may, and if I may have leave to file.

The Court: Just state the grounds and then you can argue the whole case in one bundle.

Mr. Tenny: Yes. If the Court please, the grounds for our motion to dismiss at this time at the close of the plaintiff's case—there are two grounds: First, that under the evidence which includes the Comptroller General's auditor's account which has been stipulated to, under that evidence the number of men at Fort Lewis so greatly diminished over the period of the actual contract after Mr. Kostelac's alleged default to such an extreme extent that under the law we believe the contract automatically becomes unenforceable and

the defendant is automatically by law relieved of damages.

Our second grounds for the motion to dismiss at this time is the fact that the big bond which is in evidence as a part of Exhibit No. 1, I believe it is of the pretrial order, that bid bond by its very terms sets certain conditions for liability and sets out the measure of damage. The fact is that the stipulated facts in the pretrial order conclusively show those conditions have not been met because of the wording of the bond, and it is our contention that under the law they have not proved the wording of the bond which requires the reletting of the contract, what we call the DeBoer contract, for a higher price than the Kostelac Contract, and the evidence [4] shows it was at a lower price.

The Court: Very well. I will hear you most fully on your motion at a later time, and at this time ruling on the motion will be reserved.

Mr. Tenny: I would like to make a brief opening statement as to our defense in this case.

The Court: You may.

Mr. Tenny: The defense of the defendant Kostelac, one of the two defendants, the other being the bonding company, is that this contract on which suit is brought was entered into by mutual mistake of the parties. If not by mutual mistake then by a mistake which has the same legal significance which might or might not be considered a unilateral mistake.

The mistake was this, and our evidence will show that Mr. Kostelac was invited and requested both

in writing and verbally by the Contracting Officer at Fort Lewis before bidding on the contract to go out first and look at the garbage containers to determine for himself how much garbage he could expect to find, and on the basis of what his examination showed and on the basis of his own knowledge, of course, make his bid not so much per ton for garbage but so much per man per month at Fort Lewis. This whole problem, of course, would not have arisen if Mr. Kostelac had bid five or ten dollars a ton, for example, because he would know exactly how much he was paying [5] for each ton of garbage.

Because of the type of contract desired, and it was certainly a nice type of arrangement for operating, instead of weighing garbage every day and every load, Mr. Kostelac would take his chance on how much garbage there might be as a result of having some men at Fort Lewis bid so much per man per month and take his chance on it. We have no contention that this may not vary over the period of the contract, but we do contend this, that the original price bid by Mr. Kostelac, and this was in June of 1946 that the contract was entered into, as a result of a very serious error which is admitted in the pretrial order and in the proof, as a result of that there was not the honest contracting between the parties that is required in a court of equity in order to have it an enforceable contract. We attack the original entering into of the contract in this case and we do not attack any changes thereafter.

It is our contention that on the basis of the evidence in this case the contract should be rescinded and there should be no liability thereunder.

We have a plan of proof that I would like to call to the attention of the court. In our proof, first of all, we will show from the agreed statement in the pretrial order that it was the Contracting Officer himself who asked the defendant to go there, that the Government participated by asking in [6] writing and verbally that the defendant look over this evidence and decide for himself. From the pretrial order we will also show that the contracting officer made a mistake. It is stipulated that the Contract Officer thought the garbage cans contained a one-day accumulation at that time and that in sending Mr. Kostelac out there the contracting officer himself was acting under a mistake.

Third, from the pretrial stipulated facts we will show that the contracting officer pointed out to Mr. Kostelac the importance of examining these particular containers in setting his price and told him that it was necessary to examine these in order that he could estimate what the bid under the contract should be, and this importance was brought out to the defendant directly by a conversation between the two contracting parties.

The next sequence in the proof, your Honor, on behalf of the defendant, would, of course, be to prove that the garbage in those containers was not a one-day accumulation. The pretrial stipulation did not in our opinion adequately cover this point. It merely said that there may have been a one-day

—more than a one-day accumulation, or there were some complaints made at Fort Lewis that garbage from some of the messhalls was not carried away every day. However, after the pretrial stipulation was signed just a few weeks ago, we felt that it was not sufficient for the burden which the [7] defendant has in this case to try to set aside a solemn contract, and we felt that it was incumbent upon us to prove more completely and fully the question of whether or not Mike Kostelac was actually misled by those garbage cans. We had previously asked the Government by interrogatories to furnish us the names of witnesses at Fort Lewis who were familiar with this fact. In fact, we had even filed a motion to require an answer to the interrogatories when we were told that they had no such witnesses.

The Government later amended its answer to the interrogatories and gave us, I think this was about a year ago, the names of five high officers at Fort Lewis during June of 1946 when the alleged mistake took place.

So, after the pretrial stipulation was signed in this case we went up to Chicago and contacted the man who was at the top of the list, a Lieutenant Colonel who was in charge of the entire matter at Fort Lewis, and as a result of contacting him we issued interrogatories to him which were served on the Government. The Government in turn made out counter—rather, cross-interrogatories to this Lieutenant Colonel Ryer in Chicago and we issued

several redirect interrogatories to rephrase some questions.

We think, your Honor, that on this sequence of our proof that we have conclusively shown that—well, by the depositions that the garbage was not picked up every day at Fort Lewis, [8] that the garbage in the containers in question was not a one-day accumulation of garbage but was an accumulation of more than one day, probably two days, that therefore Mr. Kostelac was misled in estimating the amount of garbage he could expect and the price he would pay, of course, and that leaves just one sequence, I think, in our proof, your Honor, and that is that we must, of course, show that Mike Kostelac personally acted upon the mistake to his detriment, that he was personally actually misled.

Mr. Kostelac has come up here with me from St. Louis to testify and our evidence will be directly from the defendant Kostelac himself.

I just wanted to mention one other point in this connection. I think that is logically our proof but we hope to prove also by Mr. Kostelac that as soon as he discovered that he had made a mistake he promptly took every step that he possibly could to try and correct it; that he left no stone unturned, whether here in Tacoma or in San Francisco where the Sixth Army Headquarters was, or in Washington, D. C., where the highest echelon was, that he made numerous trips at very considerable expense to attempt to get this contract either corrected or

to get him out of what looked like a pretty bad legal technicality.

He was entirely unsuccessful, and the evidence and the stipulated facts show that in December of 1946, about four and [9] a half months after he started under the contract he was notified by the contracting officer that the contract would be relet to someone else, which was Mr. DeBore, who thereafter carried on the garbage contract at Fort Lewis.

Mr. Kostelac never paid for the garbage, and the evidence will show he never was given an opportunity to pay anything except the price which he contended was entered into under a mistake. In this case, your Honor, we have withdrawn one of the issues that was previously discussed on the summary judgment motion, the issue of whether or not the Seattle Stock Market conformed to the requirements of the contract as a part of the give and take. In the pretrial order we have completely eliminated that issue from the case.

We have two other issues which I mentioned a moment ago on a motion to dismiss or for a directed verdict, and those two will not require evidence. They are purely matters of law.

The Court: All right. Put on your proof.

Mr. Dovell: I would like to make one correction. The pretrial order was entered in—it was May the 11th of 1946 is the date. That is the proper date.

Mr. Tenny: May the 11th?

Mr. Dovell: Yes.

The Court: Yes.

Mr. Tenny: Did I say differently? [10]

The Court: No. He said something about it being last December. Go ahead, Mr. Tenny.

Mr. Tenny: The first item of proof, your Honor, for the defendant, I would like to read to the court just two short sentences from Exhibit No. 1 which is the actual contract of this case.

The Court: All right. You may do so.

Mr. Tenny: First of all, the general provisions of the contract which are the small printed provisions, in general provision No. 5, there is contained the following statement, "Inspection: Bidders are invited and urged to inspect the property to be sold prior to submitting bids. Property will be available for inspection at the time specified in the invitation. No labor will be furnished for such purpose. In no case will failure to inspect be considered grounds for a claim."

Then, on the very first page of the contract in typewriter, paragraph No. 3 of the formal invitation of that the Government has the following statement, "Inspection dates," and then there is reference, "See general Provision 5," which I just read. There is typed in there, "June 21 to June 26 between the hours of 8:00 to 4:30 p.m. daily except Saturday and Sunday," and that is June 21 and 26, and up above it shows "1946."

Next, your Honor, I would like to read briefly from three [11] portions of the pretrial stipulation in this case. The first is on page 6 of the pretrial stipulation, paragraph 16, lines 15 to 20, breaking into the middle of a sentence here, "that the

contracting officer for plaintiff stated to defendant Kostelac prior to his bidding on the contract that the waste or garbage in said containers should represent a one-day's accumulation thereof." Then on the page before that, page 5, lines 9 to 14, which is in paragraph 15, "that in suggesting such inspection by defendant Kostelac the contracting officer had no personal knowledge that garbage and kitchen waste were not being picked up daily from the messes referred to in said contract, and said invitation to inspect, and he personally assumed that such garbage and kitchen wastes were being picked up daily as required in the written contract." Then on page 6 again, on the next page, lines 21 to 26, in paragraph 17, "That the inspection of said containers for garbage was considered by the contracting officer for plaintiff an important procedure and step prior to letting the aforesaid contract in order to estimate the probable amount of garbage under existing conditions, practices, and procedures, and defendant Kostelac was advised by the contracting officer of the importance of such inspection."

Your Honor, the defendants would next like to read the interrogatories of Colonel Ryer, and with the Court's permission I would like Mr. Hartung to sit on the witness stand and [12] answer them.

The Court: That will be a convenient way of doing it.

Mr. Tenny: I might add that we hereby withdraw all objections to the cross-interrogatories which were previously filed.

The Court: Very well.

Mr. Dovell: The objections to the interrogatories by the Government are still in order, your Honor.

The Court: All right. When do you want me to rule on those objections?

Mr. Dovell: We might as well take them up at this time.

Mr. Tenny: If it is agreeable with the Court I would prefer at the time we read them because I think perhaps the preceding question would show whether or not they are leading. I think the objection is to leading questions.

The Court: That perhaps will be desirable. After all, this is a non-jury case.

Mr. Dovell: Interrogatories 6 and 14.

The Court: I will be on the lookout when we come to those.

Mr. Tenny: This is not exactly a question, but I think I might read the full name of the witness as shown on the sworn deposition at the top. [13]

The Court: Go ahead.

Mr. Tenny: "Lieutenant Colonel Robert Ryer, III, Army Serial Number 0474134, Det. 1, 9111th Technical Service, United Food and Container Institute School, 1819 Pershing, Chicago, Illinois.

Q. Were you stationed in the United States Army at Fort Lewis, Washington, during the entire month of June, 1946?

A. Yes. Might I state, sir, I have corrected on my written interrogatories my serial number. My present serial number is O-31252. I am stationed

with the Det. 1, 9111th, QMC, Food and Container Institute for Armed Forces.

Q. Please state the position you held"—pardon me. May I start over, your Honor?

The Court: Yes.

Mr. Tenny: "Q. Were you stationed in the United States Army at Fort Lewis, Washington, during the entire month of June, 1946?"

A. Yes.

Q. Please state the position you held at said Post.

A. Post Food Service Supervisor.

Q. Please describe your duties, particularly with reference to any duties, if any, that would cause you to examine garbage containers at messhalls at Fort Lewis. [14]

A. Part of this assignment required me to inspect at Fort Lewis the messhalls. An integral part of this inspection of messhalls required me to examine the garbage containers at messhalls at Fort Lewis.

Q. During the month of June, 1946, did you personally receive any complaints from mess sergeants or other persons in charge of messhalls at Fort Lewis, based upon a contention that garbage containers had not been emptied? A. Yes.

Q. Were you during said month personally in charge of receiving and investigating complaints of this nature at Fort Lewis? A. Yes."

Mr. Tenny: I believe this next question, your Honor, is objected to.

"Q. According to your best present recollection,

were such complaints at Fort Lewis received as frequently as every other day during said month?"

Mr. Dovell: That is objected to, your Honor, on the grounds that the question is obviously calculated to produce the exact answer desired by the interrogator.

The Court: There is no doubt that in a certain sense it is leading. In fact, there isn't any doubt that it is leading in any sense. However, that objection does not always necessarily rule out consideration of the response. [15] I will take that into account in weighing the response. I will overrule the objection. Go ahead.

"A. Yes. This is an average figure for a protracted period of time.

Q. Did you personally go to the messhalls at Fort Lewis and investigate such complaints during said month? A. Yes.

Q. At said time and places did you personally examine the garbage containers at messhalls in such cases? A. Yes.

Q. Did you personally dig into and poke into the garbage in making such examinations at Fort Lewis during said month? A. Yes.

Q. Was it or was it not, aside from the above investigations also a part of your duty to inspect the messhalls at Fort Lewis during said month?

A. Yes.

Q. If so, did you also inspect the garbage containers at the messhalls at Fort Lewis during said month as a part of such duty? A. Yes.

Q. Approximately how many hours, if any, per

day did you spend on the average in examining such messhalls during said month at said places, according to your best present recollection? [16]

A. Four hours.

Q. Was John DeBoer the man who picked up garbage at Fort Lewis during the month of June, 1946?

A. I do not remember with certainty. It could have been. The name is familiar."

Mr. Tenny: This next question is objected to also.

"Q. On the basis of your personal experience in the matters referred to above, and on the basis of your own personal observations at Fort Lewis, Washington, during the month of June, 1946, please state, according to your best personal recollection, whether or not Mr. DeBoer made daily pickups of garbage at the messhalls at Fort Lewis during the month of June, 1946."

Mr. Dovell: That is objected to on the grounds that it calls for a conclusion of the witness and the witness has not been shown to be competent to testify thereto, and there is no evidence that he had such opportunity to observe the activity of the matter in question. The further ground that it is leading and obviously designed to produce an answer without proper foundation for the opinion of the witness in accordance with the claims, charges, and contentions of the defendant Kostelac.

The Court: I will take into account these objections in weighing the evidence, but I will overrule the objection.

“A. The garbage was not picked up daily. If Mr. DeBoer [17] was the driver then he did not do so.”

Mr. Tenny: Next we have the cross-interrogatories. Would you prefer to read those?

Mr. Dovell: “Q. If you have stated on Direct Examination that you were not Post Food Service Supervisor during the month of June, 1946, at Fort Lewis, and that your office was in charge of complaints at that time from messhalls at Fort Lewis, then please answer the following:

(a) What was the nature of these complaints?

A. Generally that garbage had not been picked up.

(b) Upon receipt of the same, what action was taken by you or under your direction in processing these complaints?

A. Make inspections to ascertain the reason for the garbage not being picked up and having to the best of my ability fixed the responsibility issued necessary instructions to party in error to correct the error.

(c) What record, if any, was made of these complaints and/or of their investigation?

A. No permanent record was made.

(d) What reports, if any, were made following their investigation and with what officers were they lodged?

A. Reports were only rendered on recurring situations. When messhall personnel were at fault these were verbal reports to the appropriate unit commander for corrective action. If apparent that

contractors were at fault, [18] reports were made to the salvage officer.

(e) If you have not in your preceding answer covered it, state whether or not any of these complaints or investigations or reports were ever referred to the Disposal Office, now known as the Salvage Office, and if not, why not?

A. Please see second part to answer above.

2. Q. If you have stated that you personally inspected garbage containers, then please state your answers to the following:

(a) Did or did not there appear to be sufficient number of containers at each messhall? In your answer please give estimates of size and number of containers on the average of each messhall.

A. Generally, yes. For edible garbage two 32 galvanized GI cans at the rear of each messhall.

(b) Was your personal inspection confined to containers at messhalls from which you received complaints? A. No.

(c) How many containers did you inspect on the average each day?

A. Sixteen. This is an average figure for a protracted period.

(d) In what part or parts of Fort Lewis did you make your personal inspection? [19]

A. Entire Fort.

(e) Please state whether or not in your personal inspection you found any extraneous matter such as glass bottles, broken glass, coffee grounds, or any other matter not suitable for hog feed, and if so, what action did you take in such case?

A. Sometimes this was the case. See answer to 1(b) above.

(f) Please state whether or not the garbage collector was supposed to gather garbage containing such extraneous matter? A. No.

3. State whether or not any of the containers personally inspected by you had the appearance to you of more than one day's accumulation of garbage? A. Yes.

4. If your answer to the preceding question is in the affirmative, please describe:

(a) Upon what facts do you base your estimate of the appearance of such garbage?

A. From having at that time inspected many garbage cans over a period of several years in the capacity as Nutrition Officer, Sanitary Officer, and Food Service Officer.

(b) State whether or not such facts would be so apparent [20] that anyone who examined such containers could tell the same?

A. No. One needs some experience.

5. State whether or not complaints with respect to delayed service reached your office from all of the messhalls or whether or not they were generally confined to messhalls from a certain particular locality of the Fort?

A. Yes. From all the Fort.

6. State whether or not you remained stationed at Fort Lewis during the next succeeding months in 1946. A. Yes.

7. Were you aware of an investigation conducted by the Army at Fort Lewis during the

months of June, July and August—" strike out that "June"—"1946, after complaint made by Kostelac to determine whether or not daily pick-ups had actually been made.

A. I recall there was some difficulty with the contract concerning collection of garbage.

8. If your answer to the preceding question is in the affirmative, please state whether or not you were ever contacted in such investigation with reference to the subject therein mentioned?

A. I believe I was.

9. Were you later advised of the results of the investigation mentioned in questions 7 and 8 herein above? [21]

A. I must have been.

10. If you were advised of the results of the Army's official investigation referred to in the preceding question, please state for the record the purport of the same.

A. The Government would oblige the contractor to fulfil his contract.

11. To the best of your recollection, did any of the prospective bidders at the time of letting new garbage contract at Fort Lewis in June, 1946, contact your office with respect to the inspection of garbage pursuant to the invitation and request that bidders inspect the amount of garbage before bidding?

A. I do not recall discussing with any of the prospective contractors questions pertinent to the quantities of garbage generated at messhalls at Fort Lewis.

12. If your answer to the preceding question is

in the affirmative, do you recall whether or not Mike H. Kostelac, the successful bidder at that time, was one who did contact your office in the matter of inspection, and if so, what information, if any, was furnished him by you or your office at such time with respect to amount of garbage, daily pick-ups, and related matters? Please state the substance of any information so furnished him.

A. No." [22]

Mr. Dovell: That concludes the cross-Interrogatories, your Honor. As to the redirect interrogatories, they were not served on us. However, they cover the same matter, and if the same objection is obtained why we have no objection to that being read.

The Court: All right.

Mr. Tenny: Those are rephrasing those two that were objected to. "Even though you may have heretofore answered this question, please state about how frequently or how many times per month you received the complaints, if any, referred to in the original interrogatory number 4 of the defendants herein.

A. Every other day or about fifteen times a month.

Q. Even though you may have answered this question before, please state on the basis of your own personal experience in observing the operation of the messhalls, and in observing the actual garbage containers, whether or not, according to your best present recollection, the garbage containers at

the messhalls at Fort Lewis during the month of June, 1946, were emptied daily?

A. No, they were not."

Mr. Tenny: Your Honor, there are two very short stipulations in the pretrial order that I would also like to read at this time that I should have read a moment ago.

The Court: Go ahead. [23]

Mr. Tenny: Page 6 of the pretrial order, beginning on line 4, breaking into the middle of a sentence—"that the Government admits that it may be the fact that all the garbage was not picked up every day at the time and place in question." Then on at the end of page 5 and going over into page 6, I don't have the exact line. It is right at the bottom. "—that prior to the time that defendant Kostelac inspected the garbage containers as aforesaid, there had been some complaint at Fort Lewis that all garbage was not picked up every day at certain messhalls, and the Government was not informed as to when these complaints were made."

Mr. Kostelac, would take the witness stand, please.

The Court: I think that might be of some length, and while we have had a rather short session I think perhaps we ought to have a little break now at this point. That will avoid your breaking up the examination of this witness. Recess for fifteen minutes.

(Thereupon, a short recess was taken.)

The Court: You may proceed. [24]

MIKE HENRY KOSTELAC

one of the defendants herein, called as a witness by and on his own behalf, being first duly sworn, was examined and testified:

The Clerk: State your full name and spell your last name.

The Witness: Mike Henry Kostelac.

By Mr. Tenny:

Q. Where do you live, Mr. Kostelac?

A. Belleville, Illinois.

Q. Is that near St. Louis? A. That's right.

Q. How long have you lived there?

A. Since '27, except a few years that I lived here.

Q. When did you live near Tacoma?

A. Well, it was in '56, early '56.

Q. Do you mean '46 or '46? A. '46.

Q. And where did you live at that time?

A. I lived when I first come here, I lived in Spanaway, Washington.

Q. Spanaway? A. That's right.

Q. And did you have a farm there?

A. At that time?

Q. Yes. [25] A. Later on I had a farm.

Q. When did you have a farm?

A. '46—June of '45.

Q. 1945?

A. I came in '45. That was a mistake, not in '46.

Q. Did you own the farm or rent it?

A. I leased it.

(Testimony of Mike Henry Kostelac.)

Q. And where was that farm?

A. Gig Harbor.

Q. Did you before you had any contract with Fort Lewis have a contract to remove garbage from any other installation?

A. Yes, at Bremerton, Washington.

Q. What installation was that?

A. The Navy Shipyard.

Q. The entire Bremerton Navy Shipyard?

A. The entire Naval Base, whatever you call it.

Q. When did that contract run?

A. '45 to '46.

Q. And what month of 1945 to '46?

A. July 1st.

Q. And that contract covered a span leading right up to your proposed contract at Fort Lewis, did it? A. That is right.

Q. Will you tell the court approximately how much garbage you removed in the Bremerton Navy Yard? [26]

A. Oh, it varied from twenty to forty or fifty ton a day.

Q. And did you have your own trucks to pick that up, or not? A. Yes, sir.

Q. What did you do with that garbage?

A. Fed it to the hogs.

Q. At your farm at Gig Harbor?

A. That's right.

Q. And did you do that through the entire year from the 1st of July, 1945, to the end of June, 1946?

A. Yes.

(Testimony of Mike Henry Kostelac.)

Q. And did you have your own hogs on this farm, or not? A. Yes.

Q. Will you tell the court approximately how many hogs you had at the time at the top point?

A. Eight thousand. About eight thousand.

Q. And how low would that go to?

A. Well, what do you mean by that?

Q. Eight thousand is your top figure, is it?

A. Oh, it sometimes I had them down as low as—I wouldn't have as much when I would get twenty ton. I would have maybe twenty-five hundred. If the garbage would be slipping down a little I would sell them. [27]

Q. Could you sell your hogs to even them up, more or less, depending on the amount of garbage?

A. On the amount of garbage.

Q. Did that vary in your Bremerton contract also? A. It did.

Q. Had you had experience before that Bremerton contract on collecting garbage and feeding hogs? A. Yes, sir.

Q. Where was that? A. In St. Louis.

Q. And what garbage did you pick up there?

A. Scott Field Air Base.

Q. At Belleville, Illinois?

A. Scott Air Field and Jefferson Barracks in St. Louis. And there is a Navy Base there, too, a small one.

Q. Did you pick up all the garbage at those places, or was it just part of it? A. All of it.

Q. And for how long a period of time?

(Testimony of Mike Henry Kostelac.)

A. Two years at Jefferson Barracks and one year at Scott Air Base.

Q. And how much later, then, did you come here to Tacoma? A. Right after that.

Q. Right after those contracts?

A. No, I had a few—I had a couple bone and grease [28] contracts a year before that.

Q. Bone and grease? A. That's right.

Q. Was that rendering the fat, or what?

A. That's right.

Q. Did you before June of 1946 ever contact anyone at Fort Lewis in regard to the possibility of getting a contract there for hauling away garbage?

A. Major Maiorano.

Q. How long before June of 1946 did you first contact them?

A. I contacted him a year before.

Q. And what did you contact him about?

A. About the bid for garbage.

Q. Did you ask him to let you bid on it?

A. Yes.

Q. Were you given any invitations to bid before 1946? A. Yes.

Q. When was that? A. I think in '45.

Q. About the same time in 1945?

A. That's right, in June.

Q. Did you put in a bid at that time?

A. Yes, I did.

Q. Were you successful or not? [29]

A. I was not.

Q. Who was the successful bidder at that time?

(Testimony of Mike Henry Kostelac.)

A. John DeBoer.

Q. D-e-B-o-e-r?

A. I wouldn't know how to spell it.

Q. Did you later on, then, receive an invitation from anyone at Fort Lewis to bid in 1946?

A. Yes, sir; I did.

Q. About when was that?

A. Early June. I think it was sometime in June.

Q. You think this was the early part of the month? A. Early part of June.

Q. Will you tell the court—did you bid at that time early in June? A. That is right.

Q. What kind of a bid did you submit, a fixed price?

A. Well, it was a bid—it had three parts in it, by the man a month, so much a man a month on a sliding scale, and so much a ton.

Q. Do you recall approximately what you bid per ton at that time?

A. About four to five dollars a ton.

Q. And was that bid accepted?

A. It was not, not the ton basis.

Q. Were any of those three bids in the early part of [30] June accepted by the Government?

A. Not my bid.

Q. Not your bid? A. No.

Q. Did they accept someone else's bid?

A. John DeBoer.

Q. Did he get the contract at that time?

(Testimony of Mike Henry Kostelac.)

A. No, he didn't.

Q. Will you tell the court what happened?

A. Well, we had a meeting and Major Mairoano asked DeBoer if it was all right with him if he would——

Q. Well, without going into too much detail.

A. That is the way I can explain it. He said if he could promise he would bid again on another bid they would open the bids the second time. If not, they was going to give it to me.

Q. Were they talking about a different period contract besides a one-year contract?

A. Five-year contract.

Q. In other words, they first were talking about a one-year contract, were they, and they talked about a five-year contract? A. That is right.

Q. Thereafter, later on in June did you get another invitation from the Government? [31]

A. Yes, sir; I did.

Q. And is that the invitation that is in evidence here, and the contract we are now talking about?

A. That's right.

Q. That was later in June, June the 26th, was it? A. That is right.

Q. Mr. Kostelac, will you tell us what you did after you got that invitation in the early part of June in respect to whether you examined any garbage cans?

A. When I first got my invitation to bid, I inspected the garbage containers at different mess-halls to see how much garbage they had.

Q. How did you proceed? What time of day?

(Testimony of Mike Henry Kostelac.)

A. Just ahead of the garbage truck?

Q. Was that in the morning or afternoon?

A. Morning.

Q. And how far ahead of the garbage truck were you?

A. Oh, seven or eight messhalls ahead.

Q. So you went there just before the truck came?

A. The truck was right behind me.

Q. And did you talk to anyone at the messhalls, or not? A. I did.

Q. And who did you talk to?

A. The mess sergeants.

Q. What did you ask them? [32]

A. How many men they fed in each mess, at that particular mess.

Q. Then, after you found out the number of men what did you do?

A. Then I looked at the garbage cans to see how full they were.

Q. What did you find in looking at the garbage containers?

A. Oh, there had been more than a pound a day for each man fed at the messhall.

Q. How did you figure out by looking at Garbage cans there would be about a pound a man a day?

A. Well, I have had experience over twenty years in handling garbage.

Q. And did you feel the weight of it, or what?

(Testimony of Mike Henry Kostelac.)

A. Well, I just leaned the can over. I didn't dig into it.

Q. And do you know the approximate weight of those garbage cans? A. I do.

Q. How much do they weigh when they are full?

A. About two hundred pounds. It varies according to the kind of garbage.

Q. Does it make a difference, then, there if there is dry garbage or— [33]

A. Liquid or dry garbage.

Q. Does it make a difference what time of the year it is, whether there are canteloupes and so forth?

A. That is right. Green vegetables and everything makes a difference.

Q. Did you take all those matters into consideration when you decided what you thought the amount of garbage per man was? A. I did.

Q. And about how many of those messhall garbage cans did you examine at that time?

A. Oh, fifteen or twenty in each section. I imagine over forty or fifty.

Q. How many principle sections were there at Fort Lewis?

A. I believe there is four—three four or five. I don't remember.

Q. In examining all of them did you or did you not go ahead of the garbage truck?

A. That is right, always.

Q. About how many garbage cans were there at the messhalls?

(Testimony of Mike Henry Kostelac.)

A. About two. It all depends on how big the messhall was. The larger ones have more. Some would have more and some would have different sized cans. [34]

Q. Did the Contracting Officer, Major Mairoano ever go with you on those inspections?

A. No, he didn't.

Q. Did you talk to him personally before or after the inspections? A. Yes, I did.

Q. Was it before or after? A. Before.

Q. What did you——

A. And after.

Q. What did you talk to him about?

A. Oh, the amount of garbage they had on the Post and how often they picked up, and things like that.

Q. Did you talk to him about whether the amount of garbage in the can was a one-day accumulation or two days?

A. Yes, and there was daily pickup.

Q. Did he tell you that?

A. That is what he told me.

Q. Did he say what the contract called for?

Mr. Dovell: I object to that question, your Honor. The pretrial order does not admit any evidence that is adverse to what is agreed to in the pretrial order.

Mr. Tenny: This isn't adverse.

Mr. Dovell: That is adverse to any specified fact. what he told him. [35]

The Court: Well, I don't quite follow your

(Testimony of Mike Henry Kostelac.)

point there, Mr. Dovell. Would you mind making that a little more clear, please.

Mr. Dovell: Yes, your Honor. I might say that this was put in at the instance of the defendants at the trial of this cause, and the additional evidence——

The Court: What page?

Mr. Dovell: Page 15. "Either and both parties may submit additional evidence on any of the issues of this case provided such evidence shall not contradict any facts agreed to herein." I feel that states exactly what was told him.

The Court: In what manner?

Mr. Dovell: This Contracting Officer told him this was exactly one-day's accumulation. The contractor did not tell him that.

The Court: Just a moment. Where in the admitted facts do you find the statement that you think now is being contradicted?

Mr. Dovell: On page 5, line 21. "It was his opinion based upon the amount of garbage he was collecting that Kostelac told him that he had not collected daily as required by his contract."

Mr. Tenny: Your Honor, that is a statement made after the dispute had arisen.

The Court: Shortly after the defendant Kostelac [36] commenced to collect garbage he advised it was his opinion. I don't follow you there.

Mr. Dovell: On page 6 now, starting at line 15. "That the Contracting Officer of plaintiff relied upon such provisions of said contract and was not

(Testimony of Mike Henry Kostelac.)

personally aware of any violations of said provisions of said contract, and accordingly stated to defendant Kostelac prior to his bidding on the contract that the waste garbage in said contract should represent a one-day's accumulation thereof." He did not emphatically declare that it did.

The Court: Well, I think that here we may possibly differ in the meaning of words. I will hear the evidence.

Mr. Tenny: Would you read the last question?

The Court: The last question is, what did the major say to you prior to the time of contract concerning the amount of garbage?

The Witness: Was there an answer given?

The Court: I am not sure. If there was an answer, it was lost in the objection. Just answer it again, Mr. Kostelac.

The Witness: Well——

The Court: Keep in mind what the question is now. Before the contract what did Maiorano say to you concerning the quantity of garbage, if he said anything?

The Witness: Yes, sir; your Honor. I talked to [37] Major Maiorano about the garbage and the camp, how big it was and everything, and we had a long discussion, and he told me that DeBoer had five and six trucks going in and out every day hauling it out. So then I asked him how big the trucks were, which I have seen the trucks, and he said—he asked me how much did I think that they would haul, and I would say four and five ton, and

(Testimony of Mike Henry Kostelac.)

I thought there ought to be about twenty tons and he kind of thought I was a little too high. Then I explained to him, "You told me it was five and six trucks a day. If each truck hauled four or five ton it would be twenty ton," and he agreed that that was a fair figure.

Mr. Dovell: Your Honor, I must object. That is not responsive to the question.

The Court: Well, I think it is responsive to the first question. Whether it was responsive to counsel's question or not might be a difference of opinion.

Mr. Dovell: I have no objection to the evidence, your Honor.

Q. (By Mr. Tenny): Did Major Maiorano talk to you at all about whether or not it was important for you to look at these garbage containers?

A. Yes, he did.

Q. And what were his words as you remember them, or what did he say to you?

A. He said—state that again a little bit. [38]

The Court: What did he say about whether it was important to look at the garbage cans?

The Witness: The importance is—

The Court: What did Maiorano say about it, not the importance. What did Maiorano say about it, if you remember he said anything.

The Witness: I don't remember the exact words, but he did tell me to go out and inspect the mess-halls for myself.

Q. (By Mr. Tenny): Did he mention anything

(Testimony of Mike Henry Kostelac.)

Q. Now, tell me about Mr. DeBoer's existing contract at that time?

A. Yes, he did. I knew the contract from the year before.

Q. And did you discuss at all about whether or not that contract required him to pick up the garbage every day?

A. It did, yes.

Q. And that was that bid of June, 1945, that you bid on yourself, you say?

A. That's right.

Q. And also this new contract that you were negotiating for, I believe, called for daily pickups, too?

A. Daily pickups.

Q. Did anyone ever tell you that they were not going to insist on daily pickups?

A. No, sir; nobody ever has.

Q. You have testified to examining the garbage cans, [39] Mr. Kostelac. Did you poke into the garbage at all?

A. No, I didn't.

Q. Why didn't you do that?

A. Well, I was dressed up and there was no need of poking into it.

Q. Had Major Mairorano told you anything about the garbage, whether it was one day or two days?

A. No, he didn't.

Q. I mean before.

A. No.

Q. Did you feel it was necessary for you to examine the nature of the garbage underneath?

A. No.

Mr. Dovell: I object to that question, your Honor. Here is a man that has been on the job for

(Testimony of Mike Henry Kostelac.)

ages. He is a great contractor of garbage, then he is asked whether it was necessary for him to do that. The witness should be qualified to examine garbage.

The Court: I am sure he is. I think I must hear the matter rather liberally. I will consider any more or less argumentative points of that character when I have heard it, within reasonable limits, of course. He has answered. Proceed.

Q. (By Mr. Tenny): Did you notice anything about the garbage, the smell or otherwise, that caused you to believe [40] it was more than one-day's accumulation?

A. No, not with the weather that is here compared to back east. Back in St. Louis where it is 90 and 100 degree weather in June and July, and here with a moderate temperature of 60 or 70 degrees, I didn't expect the garbage to be spoiled like that.

Q. Did you see any evidence of maggots or spoiling?

A. No. Another thing, too, is the way the garbage is brought out. It is brought out and dumped on top of each other and there is always fresh garbage on the top even though it is decayed at the bottom.

Q. Does that tend to cover up the odor?

A. It does.

Q. You testified that in the early part of June, I believe it was June the 7th—

A. June 7.

Q. You testified that you went out ahead of time, ahead of June 7, did you?

(Testimony of Mike Henry Kostelac.)

A. That's right.

Q. And did you again on June 7 or around there——

A. The morning of June the 7th I again went out.

Q. That is the date you submitted a bid?

A. That is right.

Q. What time of the morning did you go out?

A. It must have been about 8:30 or [41] 9 o'clock.

Q. What procedure did you go through?

A. The same as I did the first time.

Q. About how many garbage cans did you examine? A. About the same amount.

Q. That was—did you also talk to the mess sergeants that time?

A. Yes, sir; I did, in some places, and some of them I didn't. The majority of them I did.

Q. As a result of what you found the second time, on June 7th, what was your conclusions as to the amount of garbage per man per day?

A. Over a pound.

Q. The same as your previous conclusions?

A. That's right.

Q. Did you thereafter when you were invited to bid on June 26th, did you later go out and examine it again, Mr. Kostelac?

A. I examined it twice after the first bid.

Q. In addition to the first two you examined it two more times?

A. Twice more, and also two trips which I didn't

(Testimony of Mike Henry Kostelac.)

examine garbage. I went through the camp to see how big the area was and where the messhalls were, all of them were.

Q. You went there twice in between these two biddings? A. That's right. [42]

Q. And how did you happen to go? What was the purpose of that?

A. To bid on the—well, to check—get another check on it to make sure.

Q. Now, when in respect to this June 26 bid, when did you first go out and examine the containers then? A. Do you mean—

Q. The second time. The second bid.

A. It was—I don't remember just when, but the day of the bid, that is one time I went, on the morning of—what is it?—the 26th, and probably five or six days before that.

Q. Did you go through the same procedure?

A. Yes, I did.

Q. Did you find anything different on either of those two occasions than what you had found on the previous two occasions?

A. The only thing I found probably, on the second time where I wouldn't be sure of it, is the different grade of the garbage. Like, probably, they had watermelons the first day or mushmelons, and the other days they didn't, it was still garbage there and plenty of it.

Q. Do you know about how many times you inspected these last two visits?

A. How many messhalls? [43]

(Testimony of Mike Henry Kostelac.)

Q. Yes, how many messhalls.

A. Over forty of them.

Q. And you used the same procedure going out ahead of these trucks that were coming in?

A. Ahead of the truck.

Q. Had Major Mairoano said anything differently to you in respect to when garbage was picked up?

A. No.

Q. The latter time as compared with the former?

A. No, he never said anything.

Q. Did you or did you not rely upon Major Mariano's estimate when you estimated the garbage?

A. I did.

Q. And in preparing your bid, did you or did you not go on the assumption that you saw an accumulation of one day in those containers?

A. Yes, I did.

Q. Is that true of all four of these visits?

A. That is all four inspections.

Q. I believe your bid also was on a sliding scale depending on the market for hogs in Seattle, was it not?

A. That's right.

Q. And your bid would go up if the price went up?

A. If the price of hogs went up, the bid would go up.

Q. Did you determine in your own mind what the range of your [44] price was per ton for garbage depending on how the market went?

A. Well, the highest would have been right

(Testimony of Mike Henry Kostelac.)

around eight or ten dollars a ton when hogs were at thirty dollars.

Q. I think your bid was fourteen and a half cents, wasn't it, at the very maximum?

A. That's right.

Q. And you figured that would be about nine or ten dollars a ton? A. Nine or ten dollars a ton.

Q. When the market was down, you figured it would be about what?

A. Well, at the present time—at that time it would have been about four to five dollars a ton.

Q. And that was your understanding of how you were bidding at that time?

A. That's right.

Q. Mr. Kostelac, to your knowledge, was there any other way you could check on the amount of garbage you would get besides making these inspections? A. No.

Q. Did you compare that or not with your experience at Jefferson Barracks and Scott Field and Bremerton? A. Yes.

Q. And about what had been your experience on garbage [45] per day per man at those places?

A. Over a pound.

Q. Over a pound? A. Yes.

Q. Did you ever discuss with Major Mariano or anybody else the provisions in your contract concerning the amount of garbage you could expect to get?

A. There was a provision in there something about four hundredths of a pound a man per day.

(Testimony of Mike Henry Kostelac.)

Q. Per man? A. Per month.

Q. Per month? A. That's right.

Q. Per day, wasn't it?

A. I wouldn't know.

Q. Well, at any rate—

A. I believe you are right, per day.

Q. What was your conversation—

Mr. Dovell: I object to that on the grounds that it is an attempt to vary the terms of a written instrument by parol evidence. The instrument is in there, and there is no contention made other than the pretrial order.

Mr. Tenny: There is significance to that being written in the contract. Mr. Kostelac had [46] signed an agreement in which it says the estimate of garbage per man per day is four hundredths of a pound. It is a written instrument. However, that is merely an admission against him that he signed something which he can certainly explain. That is not the type of contract which cannot be deviated from. He is not deviating from an obligation under the contract. He is deviating from a written statement which is damaging to him otherwise, but, certainly, I believe he may impeach that.

The Court: Well, I must confess that the situation is not entirely clear to me. I will hear the evidence and consider what, if any, effect to give to it later. Go ahead.

Q. (By Mr. Tenny): Will you tell us what was said between you and Major Mariano concerning that provision you have just testified to?

(Testimony of Mike Henry Kostelac.)

A. That four one-hundredths?

Q. Yes.

A. In other words, I explained to him that that four one-hundredths at 40,000 men would only be 1,600 pounds. That would be less than two-thirds of an ounce a man.

Q. And your sixteen hundred pounds per day would be what, less than a ton, would it? [47]

A. Less than a ton.

Q. And how many tons per day had you seen in your estimate as you examined the cans?

A. My estimate, the way I had seen it, would be from nineteen to twenty-two ton.

Q. That would be less than one ton, is that correct? A. That is right.

Q. In your previous experience with contracts near St. Louis and Bremerton, had you ever experienced in any way as low as four hundredths a pound per man per day? A. I never have.

Q. I think you said that is less than two-thirds of an ounce per man for three meals?

A. That is right.

Q. Did you discuss that with anybody else besides Major Mariano?

A. Yes. We went to some other office. I don't remember just what office it was.

Q. And what was said there?

The Court: Do you mean another Army office?

The Witness: Right across the street there, some place there, that's right, Food Disbursing, or something like that, and they discussed it and said

(Testimony of Mike Henry Kostelac.)

to just forget about it, it is in there for some Government reason. They didn't know themselves [48] what it was in there for.

Q. (By Mr. Tenny): Did they tell you whether or not it was used in all Government contracts?

A. It is in all contracts I have seen. I have seen it for years in the contracts themselves.

Q. Is it in all other contracts you have entered into in St. Louis?

A. All my garbage contracts had that in there.

Q. Have you ever had any explanation from anywhere? A. Nobody could ever explain it.

Q. Did they agree to take it out, or did you ask them to take it out?

A. I don't know for sure whether I did here or not.

Q. Did they let you know whether or not they could take it out?

A. Yes. They said they had to have it in there and they didn't know why.

Q. So, you went ahead and signed the contract anyway, did you? A. That's right.

Q. While you were talking to Major Mariano about it, did you talk to him about the type of garbage that might only make four hundredths?

A. Well, the way I explained it to him, if one man had only one meal, if he had potatoes and meat of any kind, just [49] the peelings off the potato would be more than that.

Q. Did you say that to Major Mariano?

(Testimony of Mike Henry Kostelac.)

A. Yes, I did.

Q. What did he say?

A. He agreed and laughed about it.

Q. Did they tell you whether or not you should disregard that in making your bid?

A. That's right.

Q. And did you, in fact, when you made your bid, disregard the four hundredths pound statement? A. I did.

Mr. Dovell: I object to that again, your Honor. That is trying to vary the terms of the contract.

The Court: It is the same proposition. I will have to give thought to that further.

Q. (By Mr. Tenny): Did Major Mariano ever say to you that you were optimistic?

A. Yes, he did.

Q. In your bid? A. Yes, he did.

Q. And what did you say to him when he said that?

A. Well, I said to him, "You told me that there is four and five truck loads of garbage going out every day, and each truck had four or five ton on which is over twenty [50] ton there," and he said, "Well, I think you are right then."

Q. He said, "Well, I think you are right?"

A. That's right.

Q. And after that, Mr. Kostelac, after you were told that you were optimistic, did you thereafter examine more containers?

A. Yes, I did. That was on the first day.

Q. And was that one of the reasons you ex-

(Testimony of Mike Henry Kostelac.)

amined so many? A. That's right.

Q. Was it two or three times after that that you then examined containers after he made that statement? A. Three times.

Q. Three times? A. Yes.

Q. And did you find anything from any of your examinations that would indicate that you were over-optimistic? A. No.

Mr. Tenny: Your Honor, I would like to read one sentence from the pretrial order which fits into here.

The Court: Go ahead.

Mr. Tenny: This is on page 9 of the pretrial order beginning at line 9, right at the end of the line, "And that the price bid by Defendant [51] Kostelac, 14½ cents a maximum on scale per man per month was higher than any other comparable bid ever received at Fort Lewis, either before or after the date of said contract."

Q. (By Mr. Tenny): In regard to this second invitation for June 26th, did anyone bid besides you at that time? A. No; nobody.

Q. Mr. DeBoer didn't bid then, either?

A. No, he didn't.

Q. Did you ever have any explanation after that at all? A. He just said he changed his mind.

Q. Then, did you start performing under this contract? A. Yes, I did.

Q. And when did your contract start?

A. July the 1st of 1946.

(Testimony of Mike Henry Kostelac.)

Q. And tell the Court what happened when you went out there and started picking up garbage?

A. Well, I sent two trucks in. I was on one truck myself, and we went into two different areas in each area with one truck, and all the cans were all just full. They were just running over, and I believe we got about 28 or 29 ton that day. The following day we got the same amount and we still didn't go back to where we went the first day.

Q. Do you mean you filled up your trucks without being able [52] to clean everything up?

A. That's right, without being able to clean the whole works out. That was Sunday. The second Monday, the 3rd, we went in a different area again to clean up the—finish up all the Fort, and Maiorano stopped me and he said they had a complaint down at the hospital that the area wasn't picked up for a week. So, I sent one truck down there and got a whole truck load of garbage in that one area. And then the fourth day, the 4th of July, we already made the whole field and we started back again, and we got about 17 ton of garbage that day.

Q. That was a holiday, was it, the 4th of July?

A. That's right. And the fifth day, we got only about 10 or 11 ton, and from there on it was the same.

Q. Then, it wasn't until the few days later that you actually found less garbage?

A. The third day.

Q. Then you inspected?

A. That's right.

(Testimony of Mike Henry Kostelac.)

Q. What did you do as soon as you observed that? A. I stopped to see Maiorano.

Q. And you think that was about how many days after the contract? A. It was the third.

Q. And what did you say to Major [53] Maiorano?

A. I just told him that something looked funny, that the garbage wasn't picked up for about four or five days and we got a lot of garbage first, and then I said, "We are starting back to where we started on the first day, and the garbage is not there."

Q. Was that the first day that you made daily pickups that you are talking about?

A. That's right.

Q. In other words, you got to the point—

A. We got to the point where we knew all the stops and were making the daily pickups.

Q. And you found it was less?

A. That's right.

Q. What did Major Maiorano say when you told him that?

A. Well, he said he was going to investigate it and find out just—

Q. And did any of the mess sergeants, as you started picking it up at that time, talk to you about the difference?

A. About the fourth or fifth day I was picking up. I was on the truck myself on one truck on account of my help hadn't been arranged yet, and the sergeant come out and said, "What, are you

(Testimony of Mike Henry Kostelac.)

picking this up every day now?" That would be his remark, "How come you are picking it up every day?"

Q. Had you before that time had any knowledge at all that [54] there might not be daily pickups?

A. No, because the contract before was a daily pickup, and this contract that I bid on was a daily, too.

Q. You have testified that you talked to Major Maiorano on this a few days after your contract started. Tell us what happened after that. What did you do?

A. Oh, I went to him, I imagine, about the 10th or the 12th, or in about a week or two after I had the contract, I went to him and wanted him to see if we could do something about the mistake.

Q. Do you remember what you said to him?

A. Well, I just told him that I was misled, that the garbage wasn't picked up every day, and I had bid on twice the amount of garbage, that it was a two-days' accumulation instead of one.

Q. Did he do anything about it at that time?

A. Well, we didn't enter, but we drew out another contract that was supposed to be sent down to the Sixth Command.

Q. To the Sixth Army Headquarters?

A. To approve. And I don't know, they never did approve it, I don't think.

Q. Before we get into that, Mr. Kostelac, did you write anyone else or have your attorney write anyone else? A. I did.

(Testimony of Mike Henry Kostelac.)

Q. About when did you have your attorney [55] write? A. It was in July.

Q. And who was your attorney at that time?

A. Mr. Elliott.

Q. Stewart Elliott? A. That's right.

Q. I think he died since then, has he not?

A. That's right.

Q. And did he write it to the Contracting Officer? A. That's right.

Q. And do you know whether or not that requested that you either correct or get out of the contract? A. I did.

Q. And did you also *contract* the Sixth Army Headquarters in San Francisco? A. I did.

Q. Did you write or did you go there?

A. I flew down.

Q. And what happened there?

A. They didn't know anything about it. They was in the process of moving the first time, and the second time, I went down there two weeks later and they told me that I should go to Washington, D. C., to see the General.

Q. And did you go to Washington, D. C.?

A. I did.

Q. And who did you see there? [56]

A. I couldn't find anybody there that knew anything about it, and I went back to St. Louis and they told me to come back in two or three weeks and contact my Congressman.

Q. And who was that? A. M. L. Price.

Q. Did he go over with you?

(Testimony of Mike Henry Kostelac.)

A. His secretary went with me and spent two days.

Q. Was he able to find the files for you?

A. Never could.

Q. Did you find anyone in Washington, D. C., on either of these two visits who had any information about this? A. No.

Q. Did you find anyone who helped you in any respect? A. No.

Q. Did you find anyone in San Francisco that helped you in any respect? A. No.

Q. Did you say they were moving the files from San Francisco?

A. The first time I went there they was in the process of moving.

Q. About how many times thereafter did you make these requests to Major Maiorano to do something about it? A. Oh, many times.

Q. Can you give us any idea of how many times you requested [57] it of him?

A. Oh, about over a dozen times.

Q. And do you know whether or not Major Maiorano made an investigation?

A. I don't know whether he did or not.

Q. Did he ever tell you that he was?

A. No.

Q. Now, you started to mention something about a new agreement being drawn up. Tell us about that.

A. Well, he wanted me—to ask me what did I think that was wrong with it and how much should

(Testimony of Mike Henry Kostelac.)

I think I—if like I was telling him that it was a two-days supply and I bid high on it, where actually there was a two-day supply and it was a one-day supply, it would have been worth it, worth the money, so he says, “Now, how much do you think it should be by the man a month?” and we drew out a sliding scale, a new bid. It wasn’t exactly a bid, but it was a proposal for a bid, or something, the way he explained it. He drewed it himself, and he said, “I will send this to Frisco.”

Q. And do you know whether he sent it with his recommendation or not? A. He did.

Q. And what happened after it went to San Francisco?

A. Well, he told me they didn’t accept it. [58]

Mr. Tenny: I would like to read from page 6 of the Pretrial Order, at the beginning of paragraph 18, near the bottom, line 27:

“That on or about July 10, 1946, following the commencement of operations under the aforesaid contract by said defendant Kostelac, said Kostelac advised the Headquarters Sixth Army, Presidio of San Francisco, he had talked with the contracting officer, Fort Lewis, on the matter of his contract for the purchase of garbage, and further advised said Headquarters he had made a mistake in estimating the amount of garbage, assigning as reason for such mistake, in brief, that the garbage containers so inspected by defendant Kostelac had contained a two-day accumulation of garbage rather than a one-day accumulation.

(Testimony of Mike Henry Kostelac.)

“That a few days thereafter, said defendant Kostelac, through his attorney, by letter dated July 18, 1946, gave written notice to said contracting officer that he considered he had made a mistake, and therewith advised of his alleged difficulty in operating his business, a hog farm, successfully and on a profit from so small an amount of garbage.

“That defendant persistently pursued efforts to have the Government modify, adjust, or cancel his said contract, addressing his communications in that respect to both [59] the military and congressional authorities, and during which time, on or about July 24, 1946, defendant Kostelac undertook renegotiation of his contract with the contracting officer at a reduced sliding scale submitted by him, which renegotiation was subject to its approval by the Headquarters Sixth Army: that, however, upon referral of the same to said Headquarters, on or about August 2, 1946, it was the determination of said Headquarters that, upon acceptance by the contracting officer of said contract, certain rights accrued to the Government of the United States, that the War Department was without authority to release these rights, and that accordingly said contract would be enforced in accordance with the provisions thereof.”

Q. (By Mr. Tenny): Can you give us an estimate of the money you spent on all the trips you took, Mr. Kostelac?

Mr. Dovell: I object to that as being incompetent, irrelevant, and immaterial.

(Testimony of Mike Henry Kostelac.)

Mr. Tenny: It may go to the question of good faith of his performance of how much he did and how much he put himself out, if not other issues.

The Court: It is dubious whether it has any weight. However, you can put it in the record if you want.

Q. (By Mr. Tenny): Give us an estimate. [60]

A. Over two thousand dollars.

Q. I believe you said——

The Court: I think you are not going to be able to finish, are you?

Mr. Tenny: No, your Honor.

The Court: And, then, there will be some cross-examination. I think we will suspend until 1:45. Is that agreeable with everyone?

Mr. Tenny: Yes, sir.

Mr. Dovell: Yes, your Honor.

The Court: Very well. We will suspend until 1:45 this afternoon.

(Thereupon, at 12 o'clock noon, the court recessed until 1:45 p.m. of the same day.) [61]

Afternoon Session

Mr. Tenny: Shall I proceed, your Honor?

The Court: Yes.

Q. (By Mr. Tenny): Mr. Kostelac, will you tell us what the attitude of the Army officers at Fort Lewis was after you notified them that you had made a mistake sometime after the first of July of

(Testimony of Mike Henry Kostelac.)

1946? What attitude did they take or what did they say to you?

A. They said they couldn't do anything about it. They would have to refer it back down to Frisco.

Q. Did you talk to them at that time as to whether or not the garbage cans had been misleading?

A. Yes, I did.

Q. And did they tell you their view on that, whether they agreed or disagreed with you?

A. No, they didn't.

Q. Did they ever make any other claim on any other grounds that you were not entitled to recover?

A. No.

Q. In the last ten years, approximately, since this happened, has there ever been any other claim made against you?

A. No.

Q. You mentioned a while ago, and I want to be sure that I understand, that you thought you were bidding, viewing [62] the garbage and viewing the number of men at Fort Lewis per month, that you thought you were bidding—or, your bid ranged up to a maximum of \$9 or \$10, is that right?

A. That is right.

Q. And is that by multiplying the number of men times the estimated amount of garbage and so forth, taking all that into consideration you figured that that was your highest price, did you?

A. That's right.

Q. Now, Mr. Kostelac, will you explain to us, if you were wrong in your estimate of the amount of garbage, would you still pay the same price every

(Testimony of Mike Henry Kostelac.)

month under your contract no matter how much garbage you got?

A. What do you mean by that?

Q. Let's say you only had 5,000 at Fort Lewis per month.

Would you pay the same price per man regardless of how much garbage you got? A. No.

Q. Will you explain that to us?

A. Well, it goes by sliding scale. If the hog market, for instance, is 14 cents and you are paying 5 cents a man per month, and if the hog market goes up to 25 cents, in that category right there, there will be 7 cents a man a month. [63]

Q. I think you misunderstood. You are talking about the hog market?

A. I am, that's right.

Q. I am assuming the hog market stays the same. Is your price that you pay at Fort Lewis the same whether the men have one hundred pounds of garbage or ten thousand pounds of garbage?

A. Yes, sir.

Q. In other words, you pay the same price, do you?

The Court: You are speaking of under the contract?

Mr. Tenny: Under the contract.

Q. (By Mr. Tenny): Is that right?

A. That's right.

Q. It is your contention that since the garbage was different you were paying about twice as much, is that right?

(Testimony of Mike Henry Kostelac.)

A. More than twice as much.

Q. After you told them about this mistake, did you continue or not to pick up the garbage at Fort Lewis? A. I did.

Q. And how long did you continue to do that?

A. Until they notified me that the 15th of December was my last day.

Q. And I think you received a letter from them in November, didn't you? [64]

A. That's right.

Q. Telling you either to pay up or that you would have to drop the contract?

A. That's right.

Q. Did you have any discussions with Major Maiorano as to whether or not you had to continue to take the garbage out of there?

A. What do you mean by that?

Q. Did he ever tell you you had to or didn't have to? A. He told me I had to.

Q. What did he say to you?

A. He said—he told me it would go against me a lot more if it was—if I defaulted on it, stopped hauling it. He said I was stuck with it.

Q. Now, what did you do with the garbage that you took away from Fort Lewis after July the 1st?

A. The first month I fed about two-thirds of it.

Q. What do you mean, you fed about two-thirds of it?

A. At my farm out at Gig Harbor I used about two-thirds of the garbage, the first three or four weeks. I didn't take all of it out there.

(Testimony of Mike Henry Kostelac.)

Q. Did you haul about two-thirds about fifty miles away with you?

A. That's right. That is the first three or four weeks of the first month. [65]

Q. What was your plan as to your future if you had had the contract at the price you——

A. (Interrupting): To build a new farm at Troy, Washington.

Q. Will you tell the court what you were planning to do about that?

Mr. Dovell: I object to that, your Honor, because that is in a speculative field. It is what garbage the man could utilize at the time rather than any prospect, and I don't know about his plans or the future, or anything.

The Court: I am curious to know what theory we are hearing this on.

Mr. Tenny: Our theory is that Mr. Kostelac did not make any profit out of this because of what happened to him because of the delay that was incurred at Fort Lewis, and the refusal of anyone to give him an outright decision. It was necessary for him, at least he felt it was necessary to continue to haul away this garbage. He could not build up the farm which I am about to ask him about and which he was going to build up near Fort Lewis. Instead, he had to take what garbage he had up to Gig Harbor, and the rest, while he was waiting for a decision, he had to dump in the field.

The Court: That may be very interesting. [66]

(Testimony of Mike Henry Kostelac.)

but why is that relevant or material to the issue here?

Mr. Tenny: I don't know from the Government's pleading, your Honor, whether there is an effort here to hold Mr. Kostelac on Quantum Meruit or Quantum Valebant.

The Court: As I read the pretrial order, they were relying solely on this contract. At least that is the way I read the pretrial order. Until I see something more about it, I will sustain the objection.

Mr. Tenny: Very well.

Q. (By Mr. Tenny): Who took over the contract on December 15 when you left?

A. John DeBoer.

Q. You were never back there again, is that correct? A. That's right.

Q. Did you get a final decision from the Comptroller General of the United States at some future date? A. Yes, I have.

Q. Do you know about when that was that you got the last decision?

A. No, but it was about over a year after December 15th.

Q. One question I neglected to ask you, Mr. Kostelac, you testified concerning your previous experience at St. Louis, and Jefferson Barracks. How frequently did you [67] pick up garbage there?

A. Three times a day.

Q. And was that done strictly or not?

A. Strictly. It was in the contract.

(Testimony of Mike Henry Kostelac.)

Mr. Dovell: I didn't get that answer. Three times a day?

Mr. Tenny: Three times a day strictly, and it was in the contract.

Q. (By Mr. Tenny): Had the Government investigated your farm at any time in connection with your bidding on this contract? A. They had.

Q. Tell us when and where that was.

A. That was a few days before the bids.

Q. Before which bid?

A. I believe it was the first bid.

Q. In the early part of June?

A. Early part of June.

Q. And who investigated it?

A. Major Maiorano and two or three other officers.

Q. Did they come out and look at your farm?

A. They did.

Q. Did they look at the number of trucks you had? A. They did.

Q. Did they make any comment about how many trucks you would need? [68]

A. They was well satisfied that I could take over the operation and handle it.

Mr. Dovell: I object to that answer. It is not responsive to the question.

The Court: Well, of course, the form of the answer isn't. You better clarify that.

Q. (By Mr. Tenny): Did you—did the Government see the trucks you had out there?

A. Yes.

(Testimony of Mike Henry Kostelac.)

Q. And did you discuss with them how many trucks would be needed? A. Yes.

Q. How many trucks, or what was said about that?

A. Well, they just said my trucks was way bigger than DeBoer's trucks, that I could easily take care of it.

Q. How big were your trucks?

A. Oh, sixteen and twenty foot beds on them.

Q. And how many tons would they each hold?

A. Twelve to fourteen ton.

Q. How many trucks did you say you had?

A. Two big trucks to haul garbage.

Q. Total of how many tons you could haul a day?

A. I had four trucks, but I used only two.

Q. Those two could haul 24 tons, you say?

A. They could. [69]

Mr. Tenny: You may inquire, Mr. Dovell.

Cross-Examination

By Mr. Dovell:

Q. Mr. Kostelac, you have stated that you had bid on three occasions, one in 1945 and two in 1946, am I correct?

A. My brother and I bid together.

Q. And you had a brother out here?

A. Then, at that time.

Q. What was his name? A. Frank.

Q. You didn't have a brother John?

(Testimony of Mike Henry Kostelac.)

A. No, sir.

Q. And was he interested in garbage?

A. Back east, but not here.

Q. And this contract bid with your brother, that was the one in 1945?

A. Do you mean this contract we are talking about now?

Q. No, the one in 1945, the bid you made in '45.

A. I believe so.

Q. Then, the bid that you made first in '46, was that by yourself? A. Just myself.

Q. And, then, the bid which you were successful in and let [70] the contract on, that was by yourself? A. By myself.

Q. Prior to this time, you had been engaged in garbage hauling at the Navy Yard in Bremerton?

A. That's right.

Q. Was any time set as to pickups there, whether it was actually each day, or how frequently? A. I believe there was.

Q. You don't recall exactly?

A. No, I don't recall exactly.

Q. But you think you made a daily?

A. I did make a daily.

Q. Do you recall the number of men at the Navy Yard at that time?

A. Well, it wasn't the number of men, it was the battleships that brought the garbage in. I bought that by the ton.

Q. You bought that by the ton?

A. It was by the ton.

(Testimony of Mike Henry Kostelac.)

Q. You weren't picking up garbage from men stationed there?

A. It was picked up there, too, and off the piers.

Q. Well, was there any estimate made as to how many men and how much garbage from the men?

A. It wasn't an estimate in that it was a ton contract.

Q. And do you recall how many tons that you obtained from Bremerton? [71]

A. Do you mean a total?

Q. Yes, daily.

A. I wouldn't know the total.

Q. You didn't keep track of that?

A. No, I haven't.

Q. How was that priced?

A. \$4.12, if I am right, a ton.

Q. Where was your farm at that time?

A. Gig Harbor.

Q. And how many miles is that from Bremerton? A. Probably 16 or 17 miles.

Q. Now, do you recall your bid on a one-year basis in 1946? Do you recall what you bid then?

A. No, I don't.

Q. That was on a sliding scale also, was it not?

A. Not the first. There was three parts to that.

Q. No, I mean the bid that you actually made in 1946 when Mr. DeBoer was considered the highest bidder.

A. That was in three parts. I bid in three parts. I bid by the man, by the man on a sliding scale, and by the ton.

(Testimony of Mike Henry Kostelac.)

Q. Do you recall your sliding scale bid?

A. No, I don't. They have got it in the records, I believe.

Q. Who has the records?

A. Well, it should be in the contract, shouldn't it? [72]

Q. But you don't recall it?

A. Well, fourteen and a half was my top.

Q. No, I don't mean that, Mr. Kostelac. I mean what your sliding scale was on your bid, that is the one-year contract, not the five.

A. Well, like I tell you, again, I bid on three different proposals. They had three sections.

Q. Pick out one proposal on the sliding scale, the proposal for per man per month.

A. Fourteen and a half cents was the highest on the sliding scale.

Q. You bid the same as you did the second time?

A. I wouldn't say that I did or not. I don't know. I would have to look at it.

Mr. Tenny: I think the witness doesn't know which bid you are talking about.

Mr. Dovell: I am talking about the first bid Mr. DeBoer was bidding in 1946.

Mr. Tenny: June 7, 1946?

Mr. Dovell: Yes.

Q. (By Mr. Dovell): You have recalled what Major Maiorano said to you. Why can't you recall that bid?

A. I still can't understand you.

The Court: I don't think I fully understand it.

(Testimony of Mike Henry Kostelac.)

Make the question specific. He doesn't understand you. [73]

Q. (By Mr. Dovell): Now, in the bid as presently written, as written in the contract that you submitted, you made those figures yourself, did you not? A. Yes, I did.

The Court: That is the contract in suit you are talking about?

The Witness: That is the one that was actually signed up.

Q. (By Mr. Dovell): That was on a five-year basis, the one in this suit? A. That's right.

Q. Now, go back to the one that was for one year, that you didn't get.

A. Well, that contract.

Q. Now, what was your sliding scale? If it was any different, tell us wherein it was different.

A. There was a little difference.

Q. How much difference?

A. I couldn't say.

Mr. Tenny: I think the contract itself is the best evidence. This is ten years ago.

The Court: We have to allow some latitude in cross-examination in testing the memory of the witness. Go ahead.

Q. (By Mr. Dovell): Was that as high as was the bid of five years? [74]

A. No, it was a little lower.

Q. Do you recall how much, approximately, lower it was?

A. Well, it varies according to the hog market.

(Testimony of Mike Henry Kostelac.)

Q. I am not talking about that. I am not talking about considering the price of hogs at twenty cents. How much was your one-year contract? What was your bid at that figure?

A. Well, you can't expect me to recall all of that.

The Court: Don't argue about it. If you can't remember, just say so.

The Witness: I can't remember.

Q. (By Mr. Dovell): Do you consider how much was it off now, approximately how much was it off?

A. I wouldn't know.

Q. Would you make an estimate?

A. No, I wouldn't.

Q. You can't recall anything about that bid, can you, any figure you bid?

A. Not the figure. There is a lot of figures in there.

Q. Did you base your second bid in any way upon that first bid you made?

A. Yes, sir, I did.

Q. Was it comparable to it?

A. What do you mean by that?

Q. In comparison. [75]

The Court: Use a different term. He doesn't follow that term.

Q. (By Mr. Dovell): Was it like the first bid?

A. Yes.

Q. Very much like it? A. Close to it.

The Court: Let me see if I understand, Mr. Kostelac, are you saying now that the bid you made

(Testimony of Mike Henry Kostelac.)

the year before, the one-year contract, when you bid on that was about the same as this bid you made on the one we are now in lawsuit about?

The Witness: Within a few tenths of a cent.

The Court: But fairly close?

The Witness: Pretty close.

Q. (By Mr. Dovell): And on that bid you were not the high man? A. No, sir.

Q. Did you observe when you inspected the removal of the garbage from the Fort, did you observe how many trucks were being used by Mr. DeBoer?

A. No, I didn't.

Q. You observed the garbage preceding the arrival of the trucks? A. Yes.

Q. Did you make any inquiry as to how many trucks he was using? [76]

A. Yes. Major Maiorano——

Q. You didn't observe the trucks leaving the Fort or whether they came every so often?

A. No.

Q. Once or twice a day? A. No.

Q. In your inspection of the garbage containers, describe how you inspected those containers.

A. Well, I tilted the can to see how heavy the garbage was and how full it was.

Q. Well, at any particular messhall, or where was that?

A. Well, in the field and in each area, 15 or 20 messhalls.

Q. Do you recall how many messhalls there were in all? A. No, I don't.

(Testimony of Mike Henry Kostelac.)

Q. Have you any idea how many?

A. No, I don't know, not now.

Q. Did you at that time? A. Yes.

Q. Have you any recollection of how many you recall at that time? A. Over one hundred.

Q. And you observed the garbage at about fifteen messhalls? A. In each area.

Q. That would be about 45 or so?

A. More than 45. [77]

Q. And I understand your testimony this morning that you observed about 40 or 45 cans?

A. At least 45, yes, 40 to 45 messhalls.

Q. Now, you observed them the first day of the bid? A. Before the first day.

Q. Then you observed——

A. The day of the bid.

Q. And you had five or six days to observe this garbage? According to the contract, you had five or six days, did you not?

A. I believe so. That is right.

Q. Now, the first day you were allowed to observe the garbage, what did you do?

A. I went out and looked at it.

Q. And you looked at 15 cans that day?

A. Well, more or less, 15 messhalls.

Q. Then, the second day, what did you do?

A. What do you mean, what did I do the second day?

Q. Did you go back and look at those cans the second day? A. No, I didn't.

Q. Why didn't you?

(Testimony of Mike Henry Kostelac.)

A. Well, I went the day that I turned my bid in.

Q. You didn't go back any more?

A. Well, that was enough if it was a daily pickup.

Q. Who decided it was enough? [78]

A. Well, I did.

Q. If you were checking the amount of garbage at Fort Lewis that was being produced, Mr. Kostelac, wouldn't you as a reasonable man and as a precautionary procedure have checked the same conditions six days in succession?

A. The reason I didn't was that Major Maiorano told me that it was a daily pickup.

Q. Don't bring in Major Maiorano. You were asked to inspect this garbage yourself, weren't you?

A. That's right.

Q. Major Maiorano wasn't hired by you. He wasn't receiving any consideration from you?

Mr. Tenny: I object to your arguing with the witness.

The Court: He wouldn't understand that term, I am afraid.

Q. (By Mr. Dovell): You have had a lot of experience, haven't you, Mr. Kostelac?

A. I have.

Q. You knew how much garbage was produced by each man? A. That is right.

Q. And you knew how much garbage was produced in St. Louis, or Missouri, or at the Navy Yard, by each man?

A. I wouldn't say that I knew.

(Testimony of Mike Henry Kostelac.)

Q. Well, you knew approximately. [79]

A. But I know when I see a can of garbage, and if they fed fifty men at that messhall, how much garbage they should have, or over a pound a day.

Q. That was your experience of a pound a day?

A. Over a pound a day.

Q. Would that be any reason for being more garbage at Fort Lewis than anywhere else?

A. No, it is about the same all over.

Q. Does garbage fluctuate?

A. It is seasonal.

Q. Could it be possible that there would be more garbage at one particular time, we will say in June and in July?

A. Not too much difference in them two months.

Q. You found fluctuation in the Navy Yard?

A. Well, that was from the battleships that come in. Sometimes a carrier would come in and would have fifteen ton on it. Sometimes they would all be out of there and you wouldn't get much.

Q. Now, when you inspected these cans, were you inspecting for quantity or quality of hog feed?

A. Both.

Q. Did you make any recheck on any can?

A. Yes.

Q. How many rechecks would you say you made?

A. Every time I went in I looked at them. [80]

Q. The same cans?

A. Well, not, all of the same.

(Testimony of Mike Henry Kostelac.)

Q. Could you say now under oath that you actually rechecked any can that you checked previously?

A. Yes.

Q. You had had three occasions in which to examine and inspect garbage, had you not?

A. I had inspected them four times.

Q. No, I mean on three different occasions from 1945, in June, 1946, and later, on the last contract that you got, that would be eighteen days in all that you had to inspect garbage?

A. No, I didn't inspect. My brother inspected them in 1945.

Q. Oh, you were relying on your brother?

A. Well, he is the one that turned the bid in, if you will look it up.

Q. But you had 12 days then?

A. That's right.

Q. To inspect? A. That's right.

Q. On your first inspection, was the garbage any different than it was on the second?

A. Not too much difference.

Q. It would be the same? [81] A. Yes.

Q. Now, in regard to that, you said that you considered you would be getting around 20 tons a day under this contract, from the Fort daily, is that right? A. Yes.

Q. Now, upon what basis did you make that statement?

A. According to how much garbage I have seen at each messhall that I was inspecting.

Q. You had an average of two containers at each

(Testimony of Mike Henry Kostelac.)

messhall? A. That's right.

Q. And two hundred pounds—and that is the way that you arrived at your 20 tons?

A. Not 200 pounds. It varies. Sometimes the messhalls had 70 or some had 90, and some had 120, and some 150.

Q. I mean on the average that is the way you arrived at your 20 tons? A. That's right.

Q. You didn't actually undertake to determine the total amount that was being produced at the Fort, you merely made it from an inspection of the cans that you did look into?

A. There was no other way of making an estimate.

Q. How long would it take you to make an estimate by actual observation?

A. What do you mean by that, to go and pick it up myself and [82] weigh it?

Q. No, by looking at each can.

A. Well, I couldn't do all of that.

Q. What was the reason why you couldn't?

A. Well, the trucks was in there hauling it out of there.

Q. Well, you could, at least at the time, have observed whether the cans were empty or not if the trucks were in there, couldn't you?

A. Some places they were empty where the trucks just went by.

Q. Did you see some empty every day?

A. Every time I went ahead of the truck and behind the truck, and the garbage was gone.

(Testimony of Mike Henry Kostelac.)

Q. And there were empty cans each day you went there?

A. Behind the truck. The truck had just picked them up. They were empty.

Q. And you were in there every day?

A. Not every day, just two times at each bidding. I was in there twice.

Q. You never examined or inspected the cans except one time under each contract under each bid? A. Twice.

Q. Twice? One was the first day that was allowed you?

A. I don't remember what day it was, whether it was the first day or the fifth or the sixth. [83]

Q. And, then, you went back before you put in your bid? A. That's right.

Q. And you did that twice, once on each contract? A. Twice on each contract.

Q. That is what I have said. Now, did you keep any track of the messhalls that you had examined?

A. No.

Q. And went back the next day or so, or the day afterwards, and checked on that garbage again. Did you do anything like that?

A. I didn't keep no track.

Q. No track whatsoever?

A. Just by knowing the area.

Q. Well, each time that you examined these containers, did your estimate check out the same?

A. Yes.

Q. Now, what part of the Fort did you examine

(Testimony of Mike Henry Kostelac.)

containers? A. All four areas.

Q. Did you go to the hospital?

A. No, not to the hospital.

Q. Did you ever know of a Post Food Service Supervisor?

A. I didn't know him, but I knew of the office.

Q. Did you ever contact him?

A. With Major Maiorano.

Q. Do you remember his name? [84]

A. No, I don't.

Q. Now, what assistance did you obtain in your bidding? Did you have anybody inspect for you or anyone of your force to do any work for you in examining cans? A. No, myself.

Q. Just yourself? A. Just myself.

Q. Now, you were unable, you said, to detect whether it was a one-day or two-day accumulation at the time you examined the containers?

A. Well, I knew there was a one-year contract it was daily picked up.

Q. Could you tell whether it was garbage of one-day's accumulation by looking in the can?

A. No.

Q. You couldn't tell, then, how many days it had been? A. No.

Q. But immediately afterwards and within three or four days you were able to tell that, weren't you?

A. Oh, then, sure, when I started hauling.

Q. But you couldn't devise any means of telling before that, is that right?

A. No, there wasn't.

(Testimony of Mike Henry Kostelac.)

Q. Did there appear to be a sufficient number of containers at each messhall? [85]

A. About two.

Q. You think that was sufficient? A. Yes.

Q. That held all that was there? A. Yes.

Q. Did you continue on your farm at Gig Harbor during this time that you picked up the garbage?

A. Just for the first three or four weeks.

Q. After that time where did you go?

A. Dumped it out on the farm at Troy.

Q. Why did you do that?

A. To get rid of it.

Mr. Tenny: This testimony was excluded on direct. It would be equally improper here.

The Court: Yes, that's right. It was.

Mr. Dovell: Not this particular kind, your Honor. I am trying to bring out as to why he dumped his garbage. In other words, his prospective idea of buying a farm, setting it up some place, I am not interested in that at all. I want to know why he dumped his garbage.

The Court: Let's hear it. If it opens up the subject, we will admit the other. Go ahead. Put the question again.

Q. (By Mr. Dovell): Why was the garbage dumped? [86]

A. I didn't have any hogs to feed it to.

Q. You had sold all your hogs?

A. That's right.

Q. How many hogs did you have?

(Testimony of Mike Henry Kostelac.)

A. I wouldn't remember now exactly. Over two thousand at that time.

Q. You had enough garbage, though, to feed them? A. When was that?

Q. At that time.

A. There wasn't enough garbage to feed them.

Q. There was not enough garbage to feed two thousand?

A. All my hogs—my big hogs I sold the third or fourth week of July.

Q. What size hogs were they?

A. Three and four hundred pounds.

Q. Three and four hundred pounds?

A. Yes.

Q. Would you consider it profitable to raise a hog after 225 pounds? A. Sure.

Q. Would feed cost you more after that weight than it was worth? A. No.

Q. How many trucks did you run in to Fort Lewis during the four or five months? [87]

A. Two.

Q. Were they loaded to capacity?

A. No, sir.

Q. How much of a load or what was their capacity? A. 12 to 14 ton.

Q. Well, now, how much of a load did you have on those trucks, generally speaking?

A. Five and six ton.

Q. Had the number of men been reduced by that time at the Fort?

(Testimony of Mike Henry Kostelac.)

A. The most that—the less men they would have, there would be less garbage.

Q. How much garbage would you need to operate a two thousand hog farm?

A. About 15 ton a day.

Q. 15 tons a day? A. Of good garbage.

Q. There wasn't any guarantee in the contract about the quality of the garbage, was there?

A. No.

Mr. Tenny: Just a minute. Your Honor, I object to that question. The contract is the best evidence and does contain a provision about quality.

The Court: Well, it is exploring this witness' memory of the transaction. [88]

Q. (By Mr. Dovell): Now, you got rid of the hogs because they reached that size?

A. Yes.

Q. And you undertook renegotiations with the contracting officer? A. Yes.

Q. In your contract? A. Yes.

Q. Do you recall how much reduction you asked in that?

A. I don't recall right offhand.

Q. But you did consider that you could have operated if he had let you have the garbage at a cheaper figure? A. Yes, sir.

Q. So, it wasn't really the amount of the garbage. It was the fact that you considered you had bid too high? A. No, sir.

Q. Will you explain that?

(Testimony of Mike Henry Kostelac.)

A. The garbage wasn't there. There was a two-day supply of garbage and I took it for one.

Q. Well, if the garbage wasn't sufficient to run two trucks, couldn't you have cut your overhead down by running one truck?

A. The way it was, the garbage would have cost me \$20 a ton.

Q. That wouldn't be the amount that would be the price, would it? [89]

A. That is what it would have cost, \$20, compared to the \$8, \$9, or \$10 that I figured on as top price.

Q. Well, there wasn't anything said in the contract about the amount of garbage?

A. Four hundredths of one per cent per man. That is what the contract says.

Q. .004? A. Yes.

Q. That is all, isn't it? That wasn't overstated, was it, Mr. Kostelac? A. No, sir.

Q. Now, another feature of the expense that you had was trying to haul that garbage from Fort Lewis across the ferry to Gig Harbor?

A. Yes, sir.

Q. And how much did you pay on the ferry to get a load of that garbage across the water?

A. \$2.20 each way for every truck.

Q. That was quite an overhead, was it not?

A. It was, sure.

Q. Did you take the matter up with the Secretary of War as well as others? A. No.

Q. Army officers?

(Testimony of Mike Henry Kostelac.)

Mr. Tenny: Just a moment, your Honor, I think [90] I should object to this at the very moment it is brought up. Mr. Dovell's trial memorandum, which I saw yesterday for the first time, has a point that is entirely new that was not in the pleading and was not in the pretrial stipulation, and I assume this question goes to that. Mr. Dovell's trial memorandum states that there was a decision by the contracting officer, and apparently in an appeal to the Secretary of War, and that therefore this defendant has not pursued his administrative procedures, which, of course, is an affirmative defense and must be pleaded and certainly must be included in the issues of this case.

The pretrial memorandum lists all the issues of law and, in fact, says there will be no others, and I would have to object to that new issue being injected at the very first moment it is injected in this case, and I do.

Mr. Dovell: Your Honor, the witness has testified that he took the matter up with everybody and he went through strenuous efforts, and it is in the pretrial order that he did, so I am asking if he took it up with the Secretary of War.

The Court: I recall that statement was made that he had done everything that he could possibly do, [91] and while for the purpose of exploring that possibility, we will admit it.

Q. (By Mr. Dovell): Did you write a letter to the Secretary of War? A. I didn't.

Q. Who wrote it? A. I don't know.

(Testimony of Mike Henry Kostelac.)

Q. Did you ask anyone to write one?

A. I don't know whether it was to the Secretary of War or who to, but they wrote one to the Army some place.

Q. Were you advised that the Secretary initiated an investigation into your complaints as to this mistake, whether or not the garbage was actually picked up?

A. No.

Q. You never knew anything about that investigation?

A. What investigation?

Q. The investigation as to whether the garbage had been picked up or not, actually picked up?

A. I don't know. I can't understand what you mean by that.

Q. An investigation by the Secretary of War put into effect after you wrote to him, or after someone wrote to him.

A. I don't know nothing about it. My lawyers might know. I don't know.

Q. The contracting officer told you you were too optimistic in your bids? [92]

A. The first time, yes, he did.

Q. This didn't have any effect on you?

A. After I explained to him that, he was satisfied.

Q. The garbage that you actually obtained amounted to .04 over a period?

A. What was that?

Q. The garbage that was actually obtained over the period amounted to .04?

A. More than that.

(Testimony of Mike Henry Kostelac.)

Q. I beg your pardon?

A. More than that. Thirteen times more than that every day.

Q. No, but where the force was reduced to around five thousand men?

A. It still was more than that according to men.

Q. But with an estimate of forty thousand men and it was reduced to five thousand, .04 would be the actual amount that was available to you?

Mr. Tenny: Just a moment——

The Witness: More than that.

Mr. Tenny: Just a moment, Mr. Kostelac.

The Court: The situation is very confusing to me. I am not certain that either counsel nor the witness are talking about the same thing here. You had better clarify that a little.

Q. (By Mr. Dovell): Mr. Kostelac, you knew how much garbage [93] was produced at the Navy Yard? You knew how much was produced per man?

A. No, I didn't, not at the Navy Yard. That was by the ton.

Q. In Missouri? A. In Missouri, yes.

The Court: Over a pound per man per day?

The Witness: That's right.

Q. (By Mr. Dovell): If that were the same right over here, how much garbage would you have obtained? A. 20 ton a day at 36,000 men.

Q. But suppose it dropped to 5,000?

A. There was 36,000 men there at that time.

The Court: He asked you, suppose it were the lower number?

(Testimony of Mike Henry Kostelac.)

The Witness: Well, then, it would be that much less.

The Court: Somewhere around two and a half or three ton?

The Witness: That's right. One-eighth of that.

Q. (By Mr. Dovell): And the .04 wouldn't be a bad estimate for the period of the contract?

The Court: When you use that ".04," you don't carry it through, and I am not certain what you mean.

Mr. Tenny: That is .04, your Honor, per man per month. It is a certain quantity as to number of men. [94]

The Court: I understand that, but I think you should clarify that in the question so that the gentleman understands exactly what you mean.

Q. (By Mr. Dovell): You said it would be a mere eighth of what the force of 36,000 would be?

A. 5,000 is what, is that an eighth of 40,000?

Q. Yes.

A. So it would be an eighth of 20 ton.

Q. An eighth of one pound?

A. Eighth of 20 ton. One-eighth of 20 ton for 5,000 men.

Q. Yes, but figuring on that total, if there was only 5,000 men——

A. It would be an eighth of 20 ton.

Q. And that is about what you would have obtained if you kept on with your contract?

A. No, sir. That was my findings, 20 ton, and if there was 5,000 men, it would be one-eighth of 20,

(Testimony of Mike Henry Kostelac.)

but the finding after the three or four days of cleaning the field out where it got to where it was a daily pick-up, that would have been only one ton instead of—no, that would be one-sixteenth for 5,000 men.

Q. It took some years, though, before it got down to 5,000.

The Court: Mr. Kostelac, let me ask you a question or so so that we can get that clarified. After all, I am the one that has to decide this case, [95] so I better understand it.

Examination by the Court

Q. As I understand your position, when you went out there and examined these garbage cans, you were under the impression that they were making a daily pick-up? A. That's right.

Q. Picking up each day? A. That's right.

Q. So you looked over the accumulated garbage on these occasions to get some idea of about how much garbage per man per day you could count on?

A. That's right.

Q. Now, your experience at other installations has shown you that on the average you could expect to get a little over a pound per man per day in that type of installation, is that right? A. Yes.

Q. For the same general type of installation?

A. Could I say something, however?

Q. No, just stay with it for a minute and let me get this straight. So when you examined these cans at Fort Lewis, how did they measure up in your

(Testimony of Mike Henry Kostelac.)

estimate with the general, average that you had experienced in these other installations?

A. I will tell you. At Scott Field, Scott Air Base, [96] I had a contract there, and down at Jefferson Barracks, the Jefferson Barracks was first in '41, first started, and when the war came along they didn't have it too efficient, what you call food efficiency experts, and it was as high as four pounds to a man, but gradually they cut it down to two pounds.

Q. They cut it down, and so you got down to this figure of about a pound or a little more?

A. It was two pounds at the Barracks all the time.

Q. Now, how did your estimate of the quantity that you made before you made your bid, how did that compare with this average of a pound per man per day? A. How I arrived at that?

Q. How did the estimate that you made before you made your bid compare with what your experience had been of a pound per day per man at these other installations? A. Less than back east.

Q. In other words, the estimate that you made when you looked the cans over was that it would be a little bit less than a pound per man per day?

A. That's right.

Q. Now, when you got onto the job, got the contract and started working on it, then you found that instead of a one-day's pick-up you found it was actually about two days between pick-ups? [97]

(Testimony of Mike Henry Kostelac.)

A. July the 1st I was picking some stops. That was a seven-day pick-up.

Q. Yes, but in general you allege that your mistake was that you thought that there was a daily pick-up whereas it turned out to be about on the average of two days? A. That's right.

Q. Which means that your estimate of the garbage was just half—in general was about half again too high? A. That's right.

Q. But that would have brought the garbage at Fort Lewis down to about half of what the average had been at these other installations, wouldn't it, if that were the case?

A. The cost of the garbage?

Q. No. You told me that at these other installations where you operated, Jefferson Barracks and Scott Air Base, after they got going and they got the efficiency end of it into operation, they got it down to the place where it was approximately a pound of garbage per man per day?

A. That's right.

Q. All right. Now, you told me that when you went out and estimated the quantity at Fort Lewis before you made your bid, you found that it was a little bit less? A. That's right. [98]

Q. Now, when you made that estimate, though, you thought that you were getting a pick-up every day? A. That's right.

Q. In fact, it turned out there was a pick-up only every two days, approximately?

A. That's right.

(Testimony of Mike Henry Kostelac.)

Q. Which meant that your estimate was—you would have to cut your estimate in half?

A. That's right.

Q. Approximately in half. A. Yes, sir.

Q. That would mean, then, that the experience actually at Fort Lewis was about half in quantity of garbage what your experience had shown it to be at these other bases, is that right?

A. That is right.

The Court: At least I get the picture about it now. You may proceed, counsel.

Q. (By Mr. Dovell): But you know of no reason why a man at Fort Lewis would produce any less garbage than a man in Missouri?

A. Well, it might be different ways of feeding here than back there, and on account of the weather there is more spoilage back there than here.

Q. Spoilage wouldn't produce size or weight of the garbage, would it? [99]

A. I mean stuff that would spoil they would have to throw away, otherwise, here it wouldn't spoil with this moderate temperature here.

Q. Doesn't it seem a little peculiar to you, Mr. Kostelac, that after all your inspections and after all the contracts you have held, that you actually had to pick up the garbage yourself to find out after three or four days how much you had?

A. What do you mean, pick up myself?

Q. You yourself had to pick up the garbage before you could estimate the amount that you had?

A. That was because the garbage wasn't picked

(Testimony of Mike Henry Kostelac.)

up the last three or four days of June. The hospital area hadn't been picked up for one week.

Q. That is what you are trying to say, but did you observe that? A. I was told that.

Q. You were told that?

A. Yes, I was told that.

Q. You didn't observe it yourself, though?

A. What is that?

Q. You didn't observe that yourself?

A. No, I hadn't.

Q. You were told to inspect the cans?

A. That was after I inspected it, yes. [100]

Q. Yes, but you were told to inspect that for yourself, weren't you?

A. You are asking me something that happened after.

Q. No. I am asking you if you weren't told to inspect those cans? A. Yes, I was told.

Q. But you testified that you were too tied up to attempt it, is that right? A. No, sir.

Q. And that you only inspected one day or two days at the most, instead of the six days that you were allowed? A. No, sir.

Q. And you were allowed——

A. I inspected twice at each bidding.

Q. And you had twelve days within which to inspect?

A. I inspected twice at each bidding.

Q. Now, do you think that that is reasonable and sufficient? A. It is.

Q. Provided you have somebody to rely on?

(Testimony of Mike Henry Kostelac.)

A. No, sir, that was sufficient.

Q. You were deciding that yourself? That is your own opinion? A. Yes, sir.

Mr. Dovell: That is all. [101]

Redirect Examination

By Mr. Tenny:

Q. You mentioned in your examination, Mr. Kostelac, that you were too dressed up for something. What was that?

A. Well, I was dressed up like I am now, and I ain't going to put my hands in it, pick the garbage up and look at it.

Q. Were you too dressed up to examine the containers? A. No, sir.

Q. You think there might be a difference between Jefferson Barracks and Fort Lewis in that food spoils faster there?

A. That's right. We have hundred-degree weather back there very often in the summertime, and it probably is a hundred back there today.

Q. Is it possible that the type of food eaten here may be a little different from there, too?

A. That's right.

Q. Are you familiar with those factors, and could you tell the court exactly what caused it, do you know? A. Just what do you mean?

Q. I mean, could you say right now exactly what the complete explanation is for this difference?

Mr. Dovell: I object to that because I think it is being speculative. [102]

(Testimony of Mike Henry Kostelac.)

Mr. Tenny: I will withdraw the question. It is not a very important question.

The Court: It is an obscure question.

Q. (By Mr. Tenny): Mr. Kostelac, you were talking about dividing by an eighth which I didn't understand. If you have a pound of garbage per man and you have 35,000 men at the Fort, how many pounds of garbage will you have?

A. 35,000.

Q. Yes.

A. And that would give you seventeen and a half tons.

Q. Thirty-five divided by two? A. Yes.

Q. You were talking about an eighth, I didn't understand that.

The Court: I didn't understand it, so we are not lost on that.

Q. (By Mr. Tenny): You were asked whether you saw the Post Food Service Supervisor. Do you know for sure that that was his title? A. No.

Q. You saw somebody else?

A. We went to see somebody.

Q. Now, just one final question on this subject; did you see a difference in the level of the cans, Mr. Kostelac, when you examined them before you operated under the contract [103] and the time after you operated?

A. Do you mean were the cans at different levels?

Q. Yes. A. There was.

Q. And what was the difference?

(Testimony of Mike Henry Kostelac.)

A. Half as much.

Q. And did you personally observe that?

A. Yes, sir.

Q. After you got into operation?

A. That's right.

Q. Mr. Kostelac, you have been asked about a number of hogs you had, and I believe you said you had two thousand at Gig Harbor, is that right?

A. Over two thousand at that time.

Q. In your business do you buy and sell hogs and get more in or not? A. That's right.

Q. And are hogs available so that you can buy them according to the needs?

A. Sometimes, and sometimes they are not.

Q. Without going into your plans, if you had operated under this contract, let me ask you just one or two general questions; did you plan to set up a farm at a different place nearer Fort Lewis?

A. That's right. [104]

Q. And did you have someone lined up who would have the farm available for you to rent?

A. That's right.

Q. And did you have the hogs lined up to go into that farm? A. I could have had.

Q. Do you know how to get them, and were they available? A. They was available.

Q. And did you change your plans and dump the garbage somewhere else only because of what happened under this contract?

A. That's right.

Mr. Tenny: That is all.

(Testimony of Mike Henry Kostelac.)

Examination by the Court

Q. Mr. Kostelac, explain to me, just briefly, what difference it made to you when you found you got only half as much garbage as you had expected to get?

A. Well, there is a difference. I figure on \$9 and \$10 a ton at my high and \$4 and \$5 at my low. It would have figured that the garbage cost me a low of \$9 and \$10 or \$12, and a high of \$20 and \$22 or \$23 just for the garbage alone besides the same expense.

Q. Why is that?

A. Well, the amount that I got.

Q. Well, did the price per unit vary according to the [105] quantity you got?

A. That's right.

Q. The less you got, the more you had to pay for it?

A. No. The less the hog market was, the less I paid for it.

Q. But the hog market, of course, is something that you had to take your chances on, didn't you?

A. That's right.

Q. But assuming that the hog market remained the same, assume that it remained the same right through the period, there wouldn't be any per unit change? A. No.

Q. Per ton change in the cost to you of this garbage, would there?

(Testimony of Mike Henry Kostelac.)

A. It would have if there wouldn't be no change in it.

Q. I didn't follow you clearly, and I want to be sure I understand your position clearly on this, so let's get together now. If the hog market remained the same, and as far as I know it did because we haven't got any issue here about that—

A. The hog market raised.

Q. Well, in that case, that was something you had to take your chances on, didn't you?

A. Every time the hog market raises, it is better for the farmer.

Q. The point of it is that you had to take your chances on whether the hog market raised, according to what was [106] agreed to in the contract?

A. That is something we wish they did, raise it.

Q. Now, if the hog market remained the same, then the per unit cost of garbage, that is, the cost per ton to you, wouldn't make any difference if there was 5,000 men or 40,000 men as far as the cost per ton is concerned, is that right?

A. That is right.

Q. So the thing that caused the difficulty was the change in the hog market, then? A. No.

Q. Well, explain to me, then.

A. Well, the way it was now, now let's take a figure, I estimated at—figured at an even 20 ton, and if I was to pay—

Q. Now, wait a moment. You estimated that you were going to get 20 tons of garbage per day, is that right? A. Yes.

(Testimony of Mike Henry Kostelac.)

Q. And you estimated that on the theory of a half pound per man per day and on the theory there was going to be 40,000 men on the post? Is that the way you got at it?

A. Your Honor, it would be a pound at 40.

Q. Excuse me. A pound of garbage per man per day would be 40,000 pounds. You would get 20 tons?

A. 20 ton. And let's put a figure down. That 20 ton would [107] cost me a hundred dollars for garbage alone, and if there is a mistake in it, you get only 10 ton, that would mean that garbage cost you \$10 a ton instead of \$5 a ton regardless of the hog market.

Q. All right. I understand that.

The Court: Is there anything further that either of you want to bring up?

Mr. Dovell: I guess not, your Honor.

The Court: That is all, Mr. Kostelac.

(Witness excused.)

Mr. Tenny: That is our case, your Honor.

The Court: Is there anything further?

Mr. Dovell: I will call Mr. DeBoer.

The Court: Are you going to have just the single witness?

Mr. Dovell: I will have a couple witnesses, but they will be short, your Honor.

The Court: All right. [108]

JOHN DeBOER

called as a witness on behalf of the plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: John DeBoer.

The Clerk: Spell your last name.

The Witness: D-e-B-o-e-r.

Q. (By Mr. Dovell): Your farm is located at Nisqually just before the hills as you go up to Olympia?

A. Well, there is a trout farm there, but the hog ranch is up on the prairie.

Q. How far is your farm from here?

A. About eight miles.

Q. From the Fort? A. About eight miles.

Q. From the Fort? A. Yes.

Q. Something was asked about the contracts that the Navy had with Mr. Kostelac. Have you ever had a contract with the Navy?

A. Yes, sir, I have.

Q. The Yard at Bremerton? A. I have.

Q. And did you observe how much was produced over there in [109] the way of garbage?

A. Well, in the two-year term that I have had it, I don't think it ever got over 16 ton on one day, with daily collection.

Q. Was that on the basis of battleships arriving?

(Testimony of John DeBoer.)

A. Well, it was—that was the limit. If a battleship would arrive, 16 ton a day would be the limit.

Q. What number of trucks did you employ in picking up the garbage at Fort Lewis?

A. From three to four trucks.

Q. And you are the present garbage contractor at Fort Lewis? A. Yes, sir.

Q. What was the capacity of these trucks?

A. About eight ton.

Q. And how many trips did they make each day?

A. What time?

Mr. Tenny: Just a moment. Your Honor, it has been stipulated here that the Government will introduce no evidence in this case as to the frequency of pickups of garbage. That issue has been withdrawn as far as the Government is concerned. I object to any testimony by this witness in that respect at all. The statement is very broad in the pretrial order that there will be no evidence in that respect. [110]

The Court: No evidence contrary to what is stated in the pretrial order.

Mr. Tenny: No evidence in that respect at all.

Mr. Dovell: I will place it this way, your Honor, how much garbage did you receive from Fort Lewis?

Mr. Tenny: Just a moment, I object. The pretrial stipulation, your Honor—

The Court: You have got to point this out to me, gentlemen, because it is an extensive pretrial

(Testimony of John DeBoer.)

order, and I will have to have my attention called to particular portions of it.

Mr. Tenny: Page 9, paragraph 20.

Mr. Dovell: I might say, your Honor, after that pretrial order was drawn up, counsel acquainted me with the fact that they now were ready to take a deposition of Mr. Ryer, and—

Mr. Tenny: I didn't hear the first part.

The Court: He said that after the pretrial order was drafted is when you notified him of the taking of the deposition of Ryer.

Mr. Tenny: When we found they had not conceded the daily pickup, at that time we took a deposition. The Government—may I say this, your Honor, the Government proposed this paragraph 20 and [111] this pretrial stipulation.

The Court: It does seem to me that under the pretrial order you would not raise any issue on this.

Mr. Dovell: That is the point, your Honor. I am not asking Mr. DeBoer, he wasn't there, and I am not asking him if there was an actual pickup made. I am merely asking him how much garbage he received daily from the Fort.

The Court: You are not asking him about the matter of daily pickups, only the volume of garbage?

Mr. Tenny: That is getting at it indirectly.

The Court: It doesn't seem to me there is any unfairness. I will certainly take account of it. All right. The question, Mr. DeBoer, so you will understand it, is, what quantity of garbage were you

(Testimony of John DeBoer.)

getting during the period of your contract prior to the time that Mr. Kostelac came on, and that was back in 1946, I believe.

The Witness: '45.

Q. (By Mr. Dovell): June of '46.

A. At that time—I am not permitted to state the amount and loads of garbage?

The Court: We want to know the quantity. [112]

The Witness: The tonnage?

The Court: Yes, the quantity.

The Witness: That run between 35 and 40 ton daily.

The Court: 35 and 40 tons daily. Now, that is in June of 1946?

The Witness: That was in June.

The Court: June of 1946?

The Witness: Yes.

The Court: Had there been any sharp raising or lowering in that figure in the preceding several months, or was that approximately constant?

The Witness: It could fluctuate five ton a day, that is, over a period of months.

The Court: Several months prior it would have been somewhere in that vicinity?

The Witness: That's right, somewhere between 30 and 40 tons.

The Court: All right.

Q. (By Mr. Dovell): Did you know the Post Food Service Supervisor at Fort Lewis?

A. No, I did not.

Q. Did you ever receive any communication

(Testimony of John DeBoer.)

from him? A. I have not.

Q. Did you ever receive any communications from anyone, [113] the disposal officer or anyone in charge? A. Yes.

Q. At Fort Lewis? A. Yes, I have.

Q. And what was the nature of those complaints?

A. There were complaints that garbage had not been picked up. We had our drivers stop daily at the complaint office if there was any garbage that had not been picked up.

The Court: Excuse me, Mr. DeBoer—

Mr. Tenny: Pardon me for interrupting you, your Honor, but we are getting to exactly the point I was trying to avoid.

The Court: You can't do indirectly what you have said in the pretrial order you would not do directly.

Mr. Dovell: I am merely asking him whether he received any complaints.

The Court: Well, he was going beyond that. This is no criticism on you, Mr. DeBoer, but so that you will understand, there are certain propositions stated in what we call a pretrial order and once they are stated, in obvious fairness you can't depart from those things. Do you understand?

The Witness: I don't. [114]

The Court: Well, then, I won't take the time to explain it.

Mr. Dovell: We have witnesses of actual pickup. We haven't any witnesses as to whether there was

(Testimony of John DeBoer.)

actual pickup of all the garbage out of each can at the Fort, but we should be permitted to ask the witness whether there were any complaints to him.

The Court: He has already said there was a place where complaints were made, an office where you went when complaints were made.

The Witness: That's right.

The Court: All right.

Q. (By Mr. Dovell): What did you do about the complaints?

A. The complaints, as a rule, it was that the drivers would not pick it up because the garbage was mixed up with glass or foreign material, coffee grounds, and such, so that we could not mix it in with the regular garbage.

Q. Do you know what remedial steps were taken on account of that?

A. The Quartermaster — or, at the complaint office the salvage officer checked on that, and as a rule, it was corrected fairly accurately.

Q. Now, you have heard Mr. Kostelac say that he was unable to feed two thousand hogs on the garbage he was getting. [115] How many hogs were you feeding?

The Court: In June of 1946?

Q. (By Mr. Dovell): June of 1946.

A. Approximately six thousand head.

Q. What size hogs were they?

A. They would run all the way from 120 to 220.

Q. What would you say about the profitability of feeding a hog after 220 pounds?

(Testimony of John DeBoer.)

A. Well, all you do is produce lard and you get about ten cents a pound for it.

Q. If you had hogs that weighed three or four hundred pounds, would you figure you are losing money?

A. I probably wouldn't say I lost money, but I couldn't make anything on it.

Q. Now, in feeding this garbage, is it necessary to feed any other type of food to the hogs, any grain, or anything else?

A. It helps to firm up the cartilages of the animal at the butcher if you feed a certain amount of grain with it.

Q. Did you feed anything besides garbage?

A. Yes, we did, to a certain extent.

Q. You never picked up any garbage yourself at the Fort, did you? A. No, I never have.

Mr. Dovell: You may take the witness. [116]

Cross-Examination

By Mr. Tenny:

Q. You sent your men out there, did you, to Fort Lewis? A. That's right.

Q. And you know they had three or four trucks of eight tons each, is that right, eight-ton capacity?

A. Am I supposed to answer that?

Q. Yes.

A. Yes. In '46 we had three trucks operating, each one making two trips a day.

Mr. Tenny: I object to that, your Honor, I can't avoid it in these answers.

(Testimony of John DeBoer.)

The Court: Go ahead. I will keep this all in mind. Go ahead.

Q. (By Mr. Tenny): How far did you say your farm was from Fort Lewis?

A. Approximately eight miles.

Q. You didn't go there yourself, is that correct?

A. No.

Q. You gave instructions to your men as to what to do, is that right? A. That is right.

Q. Did the Government contact you in July or August of 1946 concerning Mr. Kostelac's difficulty with his contract? A. In July? [117]

Q. Well, you know when Mr. Kostelac got the contract in 1946? A. Yes.

Q. The 1st of July, wasn't it? A. Yes.

Q. After he started in under that contract, were you contacted by anyone, any officer of the Government, or anyone at the Fort and asked questions about pickups of garbage at Fort Lewis?

A. Not that I recall.

Q. No one came out to question you as to the frequency of pickups or anything else, is that correct? A. Not that I can recall, no.

Q. And your farm was right close to Fort Lewis was it? A. That's right.

Q. Did you go into the Fort quite regularly?

A. If I do?

Q. Yes.

A. Personally, yes. I go quite often to see the Quartermaster or the salvage officer.

(Testimony of John DeBoer.)

Q. You know the people there and you have for years?
A. Yes.

Q. And you have known them very well?

A. Certain ones I have, but, then, they have changed a lot, too, in between times.

Q. How long have you picked up garbage at Fort Lewis? [118]

A. Off and on for 24 years.

Q. You used to get paid for the garbage, didn't you?
A. I think we did two years.

Q. You got paid about \$8,000 a year, didn't you?

Mr. Dovell: Your Honor, I don't see what that has to do with it. I don't know what relevancy that has, your Honor.

Mr. Tenny: I would like to show there was antagonism towards Mr. Kostelac. Mr. Kostelac came in and created the first competitive situation.

The Court: Well, even so, a practice that has long since been discontinued. I don't see how that could help us.

Mr. Tenny: It is not long since.

The Court: Bring it out, then.

Q. (By Mr. Tenny): You got paid for garbage in about 1943, did you not? Wasn't that the last time you were paid for it?

A. I don't recall the year.

Q. It was right around there?

A. When we discontinued that?

Q. And it was discontinued when Mr. Mike Kostelac first came in and competitively bid on the contract?

(Testimony of John DeBoer.)

A. I don't remember, of course. That is quite a few years back, and whether it was that [119] year——

Q. No one else at Fort Lewis has ever taken the garbage contract away from you? A. Oh, yes.

Q. When was that?

A. That was in, I think, in '45.

Q. You didn't have the contract from '45 to '46?

A. Yes. I did get it back. Somebody else outbid me and then couldn't fulfill the contract and I got it back again.

Q. Who was that person?

A. That was a man by the name of Gordon out of Seattle.

Q. And why couldn't he perform the contract?

A. He didn't have the equipment.

Q. Did he bid too high?

A. Well, he was going to get paid for it, too.

Q. You say he was going to get paid for it?

A. He was going to get paid for it. He underbid me.

Q. That was in 1945? A. I believe it was.

Q. You are quite familiar with the amount that hogs bring and their weight, are you not, Mr. DeBoer? A. Do you mean to estimate?

Q. To what? A. To guess the weight?

Q. Are you familiar with the amount of money you get on the [120] market for hogs?

A. Well, we know it from month to month or from week to week, yes.

(Testimony of John DeBoer.)

Q. And do you know how that changes or varies as the weight of the hogs changes or varies?

A. Yes.

Q. Did you know that in 1946? A. Yes.

Q. Is it not a fact that in July of 1946 the price paid per hundredweight for hogs did not vary one cent, depending on the weight, whether they were over 250 pounds or not? A. In '46?

Q. That's right.

A. Was that at a time when we had OPA?

Q. I am talking about July of 1946.

A. Well, I couldn't recall that otherwise.

The Court: OPA wasn't ended until a little later than that.

The Witness: If it was on under OPA, there is the possibility that the price of 300 pounds and the price of 200 pounds was the same.

Mr. Tenny: Pardon me?

The Court: He says if it was under OPA, then the price would be the same. [121]

The Witness: It could have been. I am not quite sure.

Q. (By Mr. Tenny): Mr. DeBoer, I am not sure I understood your answer a moment ago when I asked you if anyone from Fort Lewis had ever spoken to you about the collection of garbage there right after Mr. Kostelac had his trouble.

The Court: I think Mr. DeBoer said that he couldn't recall. Had he made an inquiry of you about the collection or the amount of collections, or anything of that kind?

(Testimony of John DeBoer.)

The Witness: No.

Q. (By Mr. Tenny): You got the contract in December of 1946. didn't you?

A. The 13th, I believe.

Q. Well, in December, anyway, of 1946?

A. Yes.

Q. From the time that Mike Kostelac started to pick up the garbage as of July 1 until December when you took over the contract, did anyone from any Government office at Fort Lewis or any other army officer speak to you and ask you any questions about the pickup of garbage?

A. No. I believe it was about the week before the cancellation of Kostelac's contract that someone contacted me to ask me if I would—if I was able to fulfill that [122] contract or was willing to come back in and collect the garbage.

Q. Well, I didn't mean that. I mean, did they ask you anything about the frequency of pickups back to the June before, or anything?

A. Not that I recall.

Q. You have the garbage contract now, do you not?

A. That's right.

Q. How much do you pay for garbage?

A. Well, it is on a sliding scale.

Q. All right. What is your top sliding scale?

A. I don't recall offhand.

Mr. Dovell: I object to that question. I don't think that is in issue, your Honor.

The Court: I don't know what bearing it would have. What thought do you have in mind?

(Testimony of John DeBoer.)

Mr. Tenny: Mr. DeBoer has stated he got 35 to 40 tons—

The Court: He got 30 to 40 tons, he said, per day, over a period of a number of months prior to June of 1946, and at that time. Now, what is the point?

Mr. Tenny: My question is, how much did he pay for that garbage?

The Court: What difference does it make [123] now here, ten years later?

Mr. Tenny: I was going back—suppose I start back in 1946.

Q. (By Mr. Tenny): How much did you pay for the garbage when you took over the contract Mike had had?

A. That I can't recall offhand.

Q. It was about a third, wasn't it?

A. I couldn't recall that.

The Court: You must have that stipulated here somewhere.

Mr. Tenny: I think it is Exhibit 2.

Q. (By Mr. Tenny): Now, did you bid pretty near the maximum price when you bid in December of 1946? A. I don't believe I bid.

Q. You didn't bid? Did you get a contract in December? A. Yes.

Q. How did you get the contract?

A. It was negotiated.

Q. When you negotiated that contract, did you give them a price or did you negotiate a price that was near your top figure?

(Testimony of John DeBoer.)

Mr. Dovell: Again I object, your Honor.

The Court: Overruled. It might go to the matter of damages. Go ahead.

The Witness: At that time I bid all I thought that [124] that contract was worth, because there was a reason for it.

Mr. Tenny: That is all.

Redirect Examination

By Mr. Dovell:

Q. Mr. DeBoer, has anyone *contracted* you in the last year or so with regard to your pickups?

The Court: Do you mean what his pickups were in June?

Mr. Dovell: June of 1946, with regard to whether you made any, what time, or what interval you made your pickups.

Mr. Tenny: I don't see that that is relevant.

Mr. Dovell: I think it is relevant. Counsel has opened a question of whether he was contacted by someone.

The Court: The point he is getting at, if I am not mistaken, is that he was offered some evidence that there was no investigation made of the circumstances at that time, but whether he has been contacted in the last year or so has no bearing whatever under any theory, as far as I am concerned.

Mr. Dovell: To show whether there is any prejudice on either side, your Honor. [125]

The Court: I think that is pretty remote. There

(Testimony of John DeBoer.)

is no need to spend any more time on it. I would like to know about the reason for the bid that you said Mr. DeBoer made. If no one else is going to ask it, I will ask it.

The Witness: Okay. If you know that you are going to go and bid on a contract ahead of time, we generally are notified a month ahead of time, you can be prepared to take care of a contract like that, and you have got to be prepared. When we lost our contract on July 1st, we dismantled. We laid off our men and dismantled the hog ranch, and within 48 hours we were asked to start to operate and we didn't have any swine on hand to feed it to. We had to dump a certain amount of it. That is the reason that we couldn't bid any more on the garbage at that time as what we did.

The Court: All right. Is there anything further from this gentleman?

Q. (By Mr. Tenny): Did you have a contract with Bremerton at that time?

A. No, previous to that. [126]

* * *

HARRY C. RYAN

called as a witness on behalf of the plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Harry C. Ryan, R-y-a-n.

(Testimony of Harry C. Ryan.)

Direct Examination

By Mr. Dovell:

Q. Where do you live, Mr. Ryan?

A. 1220 South 9th Street, Tacoma.

Q. Where do you work? A. Fort Lewis.

Q. What is your position at Fort Lewis?

A. At the present time?

Q. Yes.

A. Purchasing and Contracting Officer.

Q. That was the job formerly occupied by Major Maiorano? A. Yes, sir.

Q. And in that connection, were you there when Major Maiorano was on that job?

A. I was there as Chief Clerk.

Q. Would you tell us what authority is delegated to the Contracting Officer in the matter of letting contracts as to representations, or any other matters, outside the contract itself? [129]

Mr. Tenny: I object to that as calling for a conclusion, and this will not be the best evidence as to what authority there was, and that this is not the way to prove any lack of authority, if that is what is attempted.

The Court: Are you going to cite some regulation or something of that kind?

Mr. Dovell: No, your Honor. I am merely asking whether he was instructed in regard to any authority for him to proceed in the way of advice or letting the contracts or furnishing information.

(Testimony of Harry C. Ryan.)

or anything of that kind, whether he was restricted by instructions.

The Court: Your question was a little broader than that, I believe.

Mr. Dovell: I am restricted to that, whether he had any delegated authority to——

The Court: You see, Mr Dovell, your question was so broad that it was open to the criticism that was made here. If there is some authoritative data, whether in the form of instructions from a superior, or a memorandum, or regulations or whatever, I will permit you to show that.

Q. (By Mr. Dovell): Were there any instructions from a superior in that regard as to letting contracts? [130] A. Do you mean——

Q. Instructions.

A. Instructions from a superior to the Contracting Officer?

Q. Yes.

The Court: In effect at the time in June of 1946.

Q. (By Mr. Dovell): In '46.

A. Well, we have our regular regulations. That is all.

Q. What are those regulations?

A. Written regulations.

Mr. Tenny: I object to the contents of the regulations.

The Court: If there are any regulations, they will have to be shown, if that is involved.

Q. (By Mr. Dovell): Were you present at the time of the letting of the contract in 1946?

(Testimony of Harry C. Ryan.)

A. Yes, I was.

Q. Did Mr. Kostelac come in to the contracting office at that time? A. He was in several times.

Q. Was there any conversation that you heard between the contracting officer made in your presence? A. Yes. [131]

* * *

Q. (By Mr. Dovell): Did he make any representations as to the amount of garbage?

A. No, he did not.

Mr. Dovell: That is all.

Cross-Examination

By Mr. Tenny:

Q. You are talking now, Mr. Ryan, about that one particular moment when the bids were let, were you not? A. No.

Q. What time were you talking about?

A. I am talking about at various times. [133]

Q. Well, you were——

A. When Mr. Kostelac was in the office.

Q. Yes; but you were not present every time Mr. Kostelac talked to Major Maiorano, were you?

A. I wouldn't say every time, but——

Q. But you never at any time heard them discuss that? A. No, sir.

Mr. Tenny: That is all.

The Court: That is all, Mr. Ryan. You are excused. [134]

* * *

ORAL OPINION, DECISION AND JUDGMENT

The Court: Since adjournment yesterday, I have reviewed the evidence and examined the exhibits with respect to the facts, and have reviewed your memoranda and some of the cases referred to therein with respect to the law, and have now reached my conclusions both on the facts and on the law .

There is no question but that Mr. Kostelac made an error or miscalculation when he prepared his bid for the garbage collection at Fort Lewis. Whether the error was the result of mistake in fact, in the narrow legal sense of that term, with all of its concomitant conditions and provisions, or not, is more questionable. I am not sure that it need be decided whether there was either unilateral or mutual mistake for this reason, if there were mutual or even unilateral mistake, apparently it came to Mr. Kostelac's attention within a matter of three or four days after his entry upon execution of the contract. He himself says so.

Now, if we assume that it was a case of mistake with an adverse result to Kostelac, he would have been entitled [154] then to demand either rescission or reformation, according to the nature of the mistake. Rescission would have been applicable if the mistake were of such a character that there was never a true meeting of the minds in the contract sense between the parties. Reformation would have been applicable if there were a meeting of the minds of the parties, but they mistakenly put down in the contract what their minds had met upon.

Rescission completely sets aside the contract. It is rescinded on the theory that there never was a contract between the parties through either mistake or sometimes, fraud, which, of course, isn't involved here.

The minds of the parties never met. In other words, in a case of rescission there is no contract, never was one. In a case of reformation there was a contract, but through mistake of the scrivener or someone else, the written contract fails to properly recite what the parties actually agreed upon.

Now, in this instance, Mr. Kostelac did not demand either rescission or reformation. What he sought in effect was renegotiation which was a matter for the administrative judgment and discretion of the Army authorities, and not a matter for the court. It is not within the province of the court to renegotiate a contract for these parties.

Now, if Mr. Kostelac had taken the position promptly [155] and within a reasonable time that there was no contract at all because of the alleged mistake, and had he then demanded that the contract be declared at an end and he be freed of its obligations, it is quite possible that demand might have been accepted at that time because within a few days of the letting of the contract, other arrangements for the collection of the garbage could readily have been made with some of the other bidders on the same contract, who at that time, presumably, were in business, set up and ready to take on the responsibilities of collecting garbage at the Fort.

DeBoer, for example, had his organization, his

farm and swine, his workers, his equipment, and so on, and had that rescission occurred, in all likelihood a new arrangement for the collection of the garbage could have been made with little, if any, damage to anyone; but Mr. Kostelac did not take that position. He continued with performing under the contract, or at least performing the garbage collection responsibilities required under the contract, all the while claiming and asserting that there ought to be a different basis of compensation for the garbage.

Of course, reformation was never applicable under anybody's theory of the case. No one contends that the parties actually intended a different rate of payment for the garbage than was prescribed in the written contract, [156] and that through some error someone mistakenly put down the wrong figures. No one claims that now nor have they ever claimed it at any time.

I think I have made myself clear on this. In other words, it wasn't contended that the figure should have been "five" when it was, in fact, written down "ten," or that the number of units was mistakenly recorded by the scrivener or typed up wrong, or something of that kind. There is no occasion, as I see it, in this case for reformation.

Now, this brings us down to the proposition that without demanding rescission or reformation, which, of course, was never applicable anyway, but at most asserting renegotiation which was refused ultimately by the Army authorities, Mr. Kostelac continued with the collection of the garbage until De-

ember 15, and I feel obliged to hold that in doing so, this collection was under the contract which had not been rescinded and which Kostelac hadn't asked to be rescinded. Accordingly, the garbage collected during that period must be paid for according to the terms of the contract, which, as appears from Exhibit No. 3, is in the amount of \$24,261.16, being for the period of July 1, to December 15, 1946.

Probably a rigid and narrow view of the matter would require that further damage be awarded as demanded by the [157] Government, but I do not conceive that I am obliged to take such a view under the peculiar circumstances of this case. It seems to me that Kostelac might well have secured appropriate relief by rescission had he promptly sought it, that there may well have been a substantial and important mistake as to the quantity of garbage that might be expected from the Fort, so that while I find and hold that Kostelac, who, by the way, had the benefit of counsel at this time, did not proceed as required under the law of contracts. I am persuaded that under the circumstances no further damages should be allowed, and that interest should run from the date of the certificate of indebtedness; namely, January 16, 1952, rather than from the earlier period.

That will be the judgment of the court.

Now, I am fully satisfied without expatiating on it, that this liability of Kostelac is within the intent and purpose of the bond when its provisions are considered and construed as a whole in the light of

the circumstances under which the bond was given, and, accordingly, judgment should run against the bondsman as well as the principal Kostelac.

That is the judgment of the court.

* * *

[Endorsed]: Filed August 30, 1956. [158]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith all of the original papers, pleadings and exhibits in the above-entitled cause, and the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Judgment of the above-entitled Court, filed and entered on June 22, 1956, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

1. Complaint (filed May 22, 1952).

2. Summons (with Marshal's returns of service thereon).

3. Appearance, defendant Kostelac (filed June 20, 1952).

4. Appearance, defendant Maryland Cas. Co. (filed June 20, 1952).

5. Motion and Affidavit, Plaintiff, for Order of Default (filed June 8, 1953).

6. Answer of defendants and Counterclaim for Rescission (filed Feb. 16, 1955).

7. Interrogatories to Plaintiff (filed Feb. 16, 1956).

8. Motion, defendants, for Summary Judgment (filed Feb. 16, 1955).

9. Answers to Interrogatories Propounded by Defendants (filed Feb. 28, 1955).

10. Motion to Compel Answers to Interrogatories (filed Mar. 30, 1955).

11. Memorandum in support Motion to Compel Interrogatories (filed Apr. 12, 1955).

12. Statement of Reasons, etc., Re Motion for Summary Judgment (filed Nov. 1, 1955).

13. Reply (filed Nov. 10, 1955).

14. Motion to Dismiss Defendants' Motion for Summary Judgment (filed Nov. 10, 1955).

15. Plaintiff's Memorandum Opposing Motion for Summary Judgment (filed Nov. 10, 1955).

16. Order Denying Motion for Summary Judgment (filed Dec. 9, 1955).

17. Pretrial Order (filed May 11, 1956).

18. Objections to Form of Interrogatories Propounded by Defendants (filed May 21, 1956).

19. Deposition of Lt. Col. Ryer (filed June 1, 1956).
20. Plaintiff's Trial Memorandum (filed June 1, 1956).
21. Trial Brief of Defendants (filed June 1, 1956).
22. Objections to Form of Cross-Interrogatories Propounded by Plaintiff (filed June 1, 1956).
23. Reporter's Transcript of Court's Oral Decision (filed June 11, 1956).
24. Notice of Presentation Findings of Fact, etc. (filed June 12, 1956).
25. Findings of Fact and Conclusions of Law (filed June 22, 1956).
26. Judgment (filed and entered June 22, 1956).
27. Memorandum of Costs and Disbursements (filed June 25, 1956).
28. Notice, Defts., of Appeal (filed Aug. 7, 1956).
29. Undertaking for Costs on Appeal (filed Aug. 7, 1956).
30. Notice of Appeal, Plaintiff (filed Aug. 16, 1956).
31. Order Extending Time to Lodge Appeal (Sept. 6, 1956).
32. Reporter's Transcript of Proceedings of June 4 and 5, 1956 (filed Aug. 30, 1956).
33. Defendants' Designation of Record on Appeal (filed Oct. 26, 1956).

I do further certify that as part of the Record on Appeal I am transmitting herewith the following

original exhibits admitted in evidence in the trial of the above-entitled cause, to wit:

Plaintiff's Exhibits, Nos. 1, 2, 3, 4 and 5.

I do further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit: Notice of Appeal (defendants), \$5.00; and that said fee of \$5.00 has been paid to the Clerk by the defendants, but that the fee of \$5.00 for filing Plaintiff's Notice of Appeal has not been paid for the reason that the appeal of Plaintiff is being prosecuted by the United States of America.

In Witness Whereof, I have hereunto affixed my hand and the official seal of said Court, at Tacoma, Washington, this 31st day of October, 1956.

MILLARD P. THOMAS,
Clerk;

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 15343. United States Court of Appeals for the Ninth Circuit. Mike H. Kostelac and Maryland Casualty Company, a Corporation, Appellants, vs. United States of America, Appellee. United States of America, Appellant, vs. Mike H. Kostelac and Maryland Casualty Company, a corporation, Appellees. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Southern Division.

Filed November 1, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 15343

MIKE H. KOSTELAC and MARYLAND CASU-
ALTY COMPANY, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15343

UNITED STATES OF AMERICA,

Cross-Appellant,

vs.

MIKE H. KOSTELAC and MARYLAND CASU-
ALTY COMPANY, a Corporation,

Cross-Appellees.

STATEMENT OF POINTS TO BE RELIED
UPON BY THE UNITED STATES OF
AMERICA

1. The district court erred in failing to compensate fully the United States for the damages sustained as a result of the breach and incomplete performance of the contract.

2. The district court erred in holding, in effect, that Mike H. Kostelac made an error or miscalculation when he prepared and submitted his bid for the garbage collection contract at Fort Lewis, Washington.

3. The district court erred in holding, in effect, that the supposed error or miscalculation excused Mike H. Kostelac from the complete performance of the contract and excused him from full liability for damages sustained by the United States as a result of the breach and incomplete performance of the contract.

4. The district court erred in denying judgment to the United States for the full sum of \$104,363.40 with interest from July 1, 1951.

/s/ CHARLES P. MORIARTY,
United States Attorney,
Tacoma, Washington;

/s/ PAUL A. SWEENEY,

/s/ JOHN G. LAUGHLIN,

Attorneys, Department of Justice, Counsel for the
United States.

Receipt of copy acknowledged.

[Endorsed]: Filed November 7, 1956.

[Title of Court of Appeals and Cause.]

Nos. 15343 and 15343

STATEMENT OF POINTS TO BE RELIED
UPON BY DEFENDANTS-APPELLANTS

A. The District Court ruled correctly under the law and the facts that a mistake was made in connection with the contract that made such contract voidable.

B. The District Court erred in assessing damages against defendants for the following reasons:

1. There was no evidence to support the award of such damages.

2. Under the law defendants-appellants are not liable to plaintiff for such damages or amounts.

3. The Court erroneously found that defendant Kostelac voluntarily acquiesced in, ratified or confirmed a voidable contract, or did not give adequate notice of rescission, and was therefore liable for an erroneous contract price admittedly over twice the amount intended to be bid.

(a) There was no evidence in the record of acquiescence in the contract price; no ratification or confirmation of the contract; and said defendant gave prompt and repeated notices to plaintiff.

(b) Such alleged acquiescence, ratification, confirmation or lack of adequate notice of rescission was not pleaded, nor was it included in the Pretrial Order, and it was not an issue in the case.

(c) Under the evidence any such failure of defendant Kostelac, if any, to take action was caused by the words, actions and conduct of the officers and agents of plaintiff, including threats against such defendant.

(d) Such alleged failure, if any, of said defendant was further caused by refusal of plaintiff's officers and agents to disclose to said defendant facts solely within their knowledge proving that

there was in fact a mistake involved, and proving that the officers and agents of plaintiff had been the cause of defendant's being misled.

(e) Such alleged failure, if any, of said defendant was further caused by the agreement of plaintiff's officers and agents, during the period of time in question, to reform its contract, and by plaintiff's Contracting Officer agreeing during said period to a reformed price thereunder.

(1) Whether or not higher eschelons of plaintiff later repudiated the agreement of the Contracting Officer becomes irrelevant.

(f) Such alleged failure, if any, was further caused by defendant Kostelac's lack of knowledge of his right to take action, which knowledge was kept from him by plaintiff's officers.

4. Under the evidence on this equitable defense, plaintiff, by the conduct of its officers and agents, is estopped or barred in equity from asserting herein such acquiescence, ratification, confirmation or failure to give adequate notice of rescission, if any.

5. Such finding of acquiescence, ratification, confirmation or failure to give notice, under the evidence leads to an unconscionable advantage to plaintiff and a windfall resulting to plaintiff by reason of the neglect, fault and withholding of information by its own officers and agents; and such a result would be highly inequitable.

6. The finding of the Court as to such failure, if any, by said defendant, is inconsistent with its

own findings from the evidence as to the mistake, and such finding is self-destructive.

7. The finding of the Court that plaintiff was damaged by such supposed failure of defendant Kostelac is made upon a matter not at issue in the action.

8. There was no proof of breach of the conditions of the bond sued upon herein, but the evidence conclusively shows there was no breach of such bond.

(a) It appears that plaintiff was unable to prove the legal grounds necessary for reformation of the bond and hence did not allege, prove or seek reformation of the bond; hence the provisions thereof are binding upon it in this action.

9. Plaintiff's subsequent default in its contract relating to the number of men at Fort Lewis, prevents recovery under said contract.

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN.

By /s/ GEORGE M. HARTUNG, JR.:

TENNEY, DAHMAN & SMITH.

By /s/ E. H. TENNEY, JR.,
Attorneys for Defendants-Appellants, Mike H. Kostelac and Maryland Casualty Company, a Corporation.

[Endorsed]: Filed November 12, 1956.